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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-172

In re Applications of

JANICE FAY SURBER File No. BPH-870313NB

FATE LAMONT McANALLY File No. BPH-870313NE

For Construction Permit for
New FM Station, Channel 247A,
Jellico, Tennessee

Appearances

Dennis F. Begley and *Cheryl A. Kenny*, on behalf of Janice Fay Surber; and *Russell C. Powell*, on behalf of Fate Lamont McAnally.

DECISION

Adopted: October 4, 1990; Released: October 24, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. This proceeding is before the Review Board from an *Initial Decision*, 5 FCC Rcd 1933 (1990) (I.D.), of Administrative Law Judge Joseph Chachkin (ALJ), denying the application of Fate Lamont McAnally (McAnally) and granting the application of Janice Fay Surber (Surber). Both parties have filed exceptions and replies, and the Board heard oral argument on September 12, 1990.

2. *Background*: The *Hearing Designation Order*, 3 FCC Rcd 2177 (1988), in this proceeding specified only the standard comparative issue. However, by *Memorandum Opinion and Order*, FCC 88M-4005, released November 25, 1988, (then) Chief Administrative Law Judge Fitzpatrick added the following issue with respect to Surber:

> To determine all of the facts and circumstances relating to the certification of Janice Faye Surber as to her financial qualifications to construct and operate the proposed facility and, whether, in light of the evidence adduced, she misrepresented facts or was lacking in candor with this Commission, and whether she has the requisite qualifications to be a broadcast licensee.

The burdens of proof and proceeding on this issue were placed on Surber in that *Order*.[1]

3. The succeeding ALJ who heard this proceeding ultimately determined that Surber was financially qualified, did not misrepresent her financial qualifications to the Commission, and was to be preferred under the standard comparative issue. McAnally did not except to the comparative determinations, electing to argue before the Board only that Surber must be disqualified under the financial issue.

4. *Surber's Financial Qualifications*: When Surber filed her application on March 13, 1987, she certified (FCC Form 301, Section III) that she was *not* financially qualified to construct and operate as proposed. However, on May 1, 1987 (*see* HDO, at n.1), the very last day on which Surber could amend her application "as a matter of right" (*see* 47 CFR § 73.3522(a)(6)), Surber filed an amendment to her application (consisting solely of FCC Form 301, p. 5, "Financial Qualifications"), there affirmatively certifying that she had now acquired "reasonable assurance" of the funds necessary to construct and operate. This subsequent affirmative certification was based upon the following facts and circumstances.

5. Prior to the time she filed her application, Surber approached Farmer's National Bank (FNB), where she and her husband had maintained savings and checking accounts, to borrow $2,500 for the costs of her engineering and legal fees here (Tr. 89-90, 95, 109-110). She spoke to FNB loan officer Paul Raines about the purpose of the loan, and FNB provided Surber with the requested funds. Surber also mentioned her need for money to actually construct and operate her proposed FM station, but claims that Raines made the general statement that the bank did not make loans to radio stations (Tr. 87-88, 116-117, 216). In light thereof, Surber alleges that she did not ask for "reasonable assurance" of funds for construction and operation from FNB (Tr. 85, 87-88). Soon thereafter, Surber filed her application, in which she conceded that she was not financially qualified (Tr. 90).

6. Subsequent to the filing of her application, Surber contacted two other banks regarding financing. She spoke to Dennie Byrd, a loan officer at First Federal Savings and Loan (FFSL) about obtaining a commitment from that institution. He advised that, as a savings and loan association, FFSL did not make such loans, but rather specialized in residential mortgages (Tr. 86, 89). Surber then asked Nick Gwerie, a loan officer at the Bank of Williamsburg (BOW), for a "reasonable assurance" letter. Gwerie responded only that the bank "would get back to her" (Tr. 86-87, 89-90).

7. Surber told her husband, Ted, about her discussions with the loan officers at BOW and FFSL (Tr. 120, 209), and asked him to speak with J. Will Sharp, a friend of Ted's (and an FNB director, stockholder and executive loan committee member), because she needed assurance that she could obtain a loan for construction and operation of her station (Tr. 217, 224). She purportedly told her husband that she would be willing to put up her home and the station's assets as collateral (Surber Exh. 2, p. 4).

8. Ted Surber subsequently engaged in a conversation with Sharp in April 1987 at his wife's behest, and claimed that, as a result of that conversation, he had secured an oral assurance of FNB funds from Sharp. At this juncture, it is important to interject that Sharp never testified in this proceeding, and all testimony regarding Ted Surber's conversation with Sharp was allowed into evidence over the continuing hearsay objections of McAnally. Later, Sharp did supply two declarations (one to Surber and the other to McAnally) concerning this conversation, which were considered by Judge Fitzpatrick

in adding the financial misrepresentation issue against Surber. Sharp's first declaration (dated July 11, 1988, accompanying Surber's Opposition to McAnally's Motion to Enlarge Issues, Exh. 4) stated (emphasis added):

> I, J. Will Sharp, hereby and certify, under penalty of perjury, as follows: I am presently retired. Previous to my retirement I was a director of the Farmer's National Bank in Williamsburg, Kentucky. In approximately April of 1987, when I was a director of Farmer's National Bank, Ted Surber came to visit me at my home in Williamsburg. He advised me that his wife had filed an application for a new FM broadcast station at Jellico,Tennessee and that she had requested that he assist her in obtaining financing for the station. We discussed her plans for the station and I told him that I saw no reason why the Farmer's National Bank would not be able to give her a loan for the required funds to construct the station. I have known Ted Surber since he was a child and am familiar with the Surber's assets. I, therefore,assumed that Ms. Surber would have no trouble in obtaining the loan. *I also advised him that it would be necessary to file a formal application for the loan and that it would have to be approved by the entire loan committee -- of which I was only one member.*

Subsequently (in his Reply to Surber's Opposition (Exh. A)), McAnally supplied a second declaration of J. Will Sharp, dated August 5, 1988, which stated (emphases added):

> I, J. Will Sharp, hereby certify that under penalty of perjury that the following statements are true and correct to the best of my knowledge and belief: The following is intended to clarify an earlier declaration (dated July 11, 1988) that I submitted at the request of Janice and Ted Surber. As stated in my earlier Declaration, I was visited in approximately April of 1987 by Ted Surber. As I also stated, Mr. Surber talked to me during his visit about his and his wife's interest in borrowing money to build and operate an FM radio station. I cannot recall how much money the Surbers requested. I am generally familiar with the Surbers' assets. *However, I did not tell Ted that he and his wife could get a loan from Farmers National Bank ; I simply told them how to go about applying for a loan.* I did tell Ted as a general matter that they would have no trouble getting a loan *if* they could come up with sufficient collateral. As I also told him, anyone can get a loan if they have enough collateral. *However, I did not tell Ted that he and Janice had enough collateral for the loan they wanted.* I didn't know whether they had enough collateral. I told Ted that this was a question for the loan officer and the executive board, of which I was only one member. *I instructed Ted to go directly to the bank to apply for a loan. I did not tell him to wait until a construction permit was granted by the FCC.*

9. With respect to Sharp's subsequent failure to testify at hearing (or to be deposed), the ALJ found that after the financial issue was specified against her, Surber obtained a subpoena from Judge Fitzpatrick requiring Sharp to attend a January 10, 1989 deposition in Washington. However, when Surber learned that Sharp was too ill to travel, Surber arranged for Sharp's deposition to be taken by telephone. Sharp was served with another subpoena requiring his attendance at the telephone deposition. (I.D., para. 35.) But, on January 5, 1989, Surber's counsel was advised that Sharp's daughter had contacted Surber, and indicated that Sharp was terminally ill and would not take part in any deposition. Counsel then spoke with Ms. Sharp and Mr. Sharp's pharmacist, both of whom said he had problems with his memory, and could not be deposed. Surber's offers to hold the deposition at Sharp's residence, or to take discovery by written interrogatories were refused. As a final accommodation, Surber agreed to withdraw her deposition subpoena on the promise that she be provided a notarized statement from Sharp's doctor detailing his condition and the impact on his mental state of the medications he was taking. *See* Surber's "Opposition to Motion to Quash Subpoena" filed August 30, 1989. (I.D., para. 36.)

10. On June 7, 1989, Surber requested and obtained a subpoena requiring Sharp to appear for oral testimony at hearing. However, Sharp, through counsel, filed a motion to quash the subpoena on August 28, 1989. In that motion, Sharp represented that he had cancer, diabetes, hypertension and cardiovascular disease and was in severe pain. It was also represented that Sharp was taking multiple medications. On August 30, 1989, Surber opposed Sharp's motion to quash, asserting that her attempts to obtain full details on Sharp's mental and physical condition had not been successful. By *Order*, FCC 89M-2204, released September 6, 1989, the ALJ granted Sharp's motion to quash. The ALJ held, however, that Sharp's hearing testimony could be taken by speakerphone if all parties agreed. The ALJ determined that, if such testimony were given, Sharp should furnish affidavits from his doctors detailing the medications Sharp had been taking and the impact of such drugs on Sharp's mental state. (I.D., para. 37.)

11. On September 13, 1989, Sharp's counsel provided the parties and the ALJ with a declaration from one of Sharp's physicians, which stated that Sharp was taking a strong narcotic which "may impair his memory somewhat and occasionally can cause confusion." The physician also noted that Sharp was taking Decadron, which "may also affect the clarity of his thinking," and recommended that Sharp not be subjected to "prolonged stress" in light of his medical problems. On September 18, 1989, the ALJ held a hearing conference to determine whether Sharp would testify by speakerphone. Surber, although charged with the burdens of proceeding and proof on her financial issue, apparently changed her mind and refused to allow Sharp's speakerphone testimony. Surber claimed that she believed that there was substantial doubt that Sharp's testimony by speakerphone would be reliable, particularly because the parties and the ALJ would be unable to observe Sharp's demeanor (Tr. 410-411). Accordingly, because of Surber's refusal to allow speakerphone testimony, Sharp did not testify (and has since died). *See* "Statement For The Record" filed November 29, 1989 by Surber. (I.D., paras. 32-39.)

12. Consequently, all testimony about Ted Surber's conversation with Sharp is uncorroborated; nevertheless, it is solely upon this conversation that Janice Surber relied to establish her original financial qualifications, and formed the sole basis for her amending her application affir-

matively certifying as to these qualifications on May 1, 1987. Relying only on Ted Surber's testimony, the ALJ found that in mid-April 1987, a few days after Janice Surber's visit to the Bank of Williamsburg (Tr. 120, 218), Ted Surber spoke with Sharp about his wife's plan for the radio station (Tr. 224-225). When he told Sharp that an FNB loan officer (Raines) had said FNB did not loan money to radio stations, Sharp replied that he thought that "funny," since McAnally had a loan for his Williamsburg, Kentucky AM radio station from FNB (Tr. 230-231). Surber claimed he told Sharp that his wife would offer her home and the station's assets as collateral for the FNB loan and that Sharp responded that someone willing to put up everything they have as collateral for a loan was more likely to pay it back, making the loan more attractive to the bank (Tr. 225-226). Mr. Surber then purportedly asked Sharp for a "bank loan letter." In response, Sharp allegedly replied that if Janice already had the construction permit there would be no problem with a letter, but he did not want to tie up the loan money for the years it might take her to obtain that permit (Tr. 218-219). Surber tried to explain to Sharp that a letter need not give a "legal commitment" for funds, just a "reasonable assurance," but believed that Sharp did not appear to understand the distinction (Tr. 219-220). However, Ted Surber did not recall discussing with Sharp the interest rate of the loan or terms of repayment, but claims to have discussed the principal amount and the collateral available (Surber Exh. 3, pp. 1-2; Tr. 225, 233). Further, Surber conceded that Sharp clearly indicated that he could not actually approve the loan, since he was only one member of the FNB loan committee (Tr. 228), and that a loan application would have to be sent to the loan committee when Surber actually received the construction permit (Surber Exh. 3, p. 2; Tr. 242).

13. Based solely upon her husband's conversation with Sharp, Janice Surber claimed that she believed that she had "reasonable assurance" of funds to construct and initially operate her station (Surber Exh. 2, p. 5; Tr. 86). She allegedly regarded Sharp's remarks to her husband to be as good as a loan letter, making it unnecessary to further document "reasonable assurance" (*id.* ; Tr. 107). Surber then represented to her counsel that she had obtained "reasonable assurance" of her financing, and asked counsel to provide the documents necessary to amend her application. She then filed her amendment affirmatively certifying her financial ability to construct and operate as proposed.

14. The ALJ also determined that thereafter (in May 1988) FCC counsel "discovered" that Surber did not have a letter demonstrating "reasonable assurance" of funds, and counsel advised her to do so. Surber herself, for the first time, then spoke directly with Sharp and learned that he had not been employed by FNB since December 1987 (Tr. 132, 187-188). Sharp told Surber that she should contact Butch Steely, the new chairman of FNB's board of directors (Tr. 187-188). Steely, in turn, directed Surber to Carroll Yates, Vice President of FNB (Tr. 189-191), who purportedly asked Surber about her assets, and she provided him with a financial statement (Tr. 190-204). Yates indicated that he was aware of an FNB trust account for Ted Surber, would see about a letter, and told Surber to pick up the document "the next day" (Tr. 190, 204).

15. At the Yates meeting, Surber supplied Yates a sample bank "reasonable assurance" letter (Tr. 133). However, after Yates reviewed the letter with FNB President Loron Baker, Baker believed the sample letter to imply possible legal ramifications regarding a loan. Thus, Yates and Baker revised the letter to ensure that FNB would have no legal obligation whatever (Tr. 333-334). On June 2, 1988, Surber obtained a letter from Yates which stated (Surber Exh. 5):[2]

> Dear Mrs. Surber:
>
> I was pleased to meet with you concerning the possible request for approximately $100,000 for the acquisition and construction of a new FM station in Jellico, Tennessee.
>
> After reviewing your financial statement, I feel that the Farmers National Bank would have an interest in financing the project. You need to recognize that this loan would be sometime in the future, so the bank would reserve the right to re-evaluate the request at that time.
>
> I hope that you are able to get the FM license from the Federal Communications Commission and appreciate you considering our bank for your financial needs.

16. On June 21, 1988, McAnally filed his motion to enlarge issues, there submitting an affidavit of Loron H. Baker, President of FNB. This June 12, 1988 affidavit stated as follows (Surber Exh. 4; emphasis added):[3]

> I, Loron H. Baker, hereby affirm under penalty of perjury, that the following is true and correct to the best of my knowledge. I am president of Farmers National Bank of Williamsburg, KY. On June 2, 1988, our Executive Vice President, Carroll Yates, wrote a letter at the request of Mrs. Janice Surber. This letter was written strictly as an accommodation to Mrs. Surber and was not intended as a present firm commitment by the bank to loan the sum Mrs. Surber requested. In fact, it was purposefully drafted in an ambiguous manner in order to insure that it would create absolutely no obligation on the bank's part. *It is my opinion that if Mrs. Surber were to apply for a loan from our bank on this date based upon the information that she presented to Mr. Yates (which I have reviewed), her application would be denied.* In any event, the loan she has requested could not be approved without the consent of the bank's executive loan committee.

17. *Discussion* : McAnally's exceptions are grounded primarily (if not exclusively) on its argument that, inasmuch as "the burden of going forward with the evidence and the burden of proof" on the financial issue was placed upon Surber, it was reversible error for the ALJ: (1) to admit hearsay evidence as to Ted Surber's conversation with Sharp; (2) to rely upon that hearsay as disposing of Surber's burden of proof while deciding the case in a complete "evidentiary vacuum"; and, (3) to have accepted and credited Surber's Exhibits 1 and 2 (containing the Surber's hearsay version of the single conversation with Sharp) while rejecting outright (as hearsay) his own Ex-

hibit 6 (containing the transcript of a May 8, 1988 telephone conversation between Sharp and McAnally). Surber replies that hearsay is admissible in FCC adjudications, that McAnally did not object to the admission of Ted Surber's written testimony, and that the "uncontroverted testimony from Ted Surber as to his conversation with Mr. Sharp" is sufficient for Janice Surber to prevail on the issue specified against her.

18. It is well-settled that administrative adjudications may consider relevant and material hearsay. *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Montana Power Co. v. FPC*, 185 F.2d 491, 498 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951). Indeed, "not only is hearsay admissible, but under the appropriate circumstances, it may constitute substantial evidence." *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980). The Board has recognized these precepts, noting that the weight to be accorded hearsay "depends on its truthfulness, reasonableness, and credibility," and that "a prime indicium of probity is whether the declarants are disinterested witnesses." *Perry S. Smith*, 103 FCC 2d 1078, 1082 (Rev. Bd. 1985). The Commission's Rules, 47 CFR § 1.351, also allow for the relaxation of the Federal Rules of Evidence. *See GACO Communications Corp.*, 94 FCC 2nd 761, 768 n. 15 (Rev. Bd. 1983); *see generally* K. Davis, *Administrative Law of the Seventies*, § 14.00 at 338; § 14.11, at 340 (1976). *But see United Broadcasting Corp.*, 53 RR 2d 57, 80 n. 114 (1983) (hearing exhibits relating to financial showing rejected as hearsay).

19. Here, however, we have nothing but the self-serving testimony of Ted Surber as to Sharp's alleged "assurance" of FNB funds. Not only is Sharp's "assurance" absolutely uncorroborated, it appears (1) that Ted Surber was expressly advised that Sharp had no authority to commit FNB and that a loan application would be required; and (2) FNB President Baker's affidavit of June 12, 1988 makes it clear that Surber never furnished to FNB sufficient data for any assurance of the sums purportedly envisaged. At best, Ted Surber's testimony as to his conversation with Sharp (which concedes that even the most rudimentary terms, including interest rate and terms of repayment, were never discussed) reflects that Surber "had done nothing more than discuss the possibility of a loan with a friend at the bank," precisely the type of "assurance" specifically rejected by the Board and the Commission in *Marlin Broadcasting of Central Florida, Inc.*, FCC 90-320, released October 4, 1990, at para. 5.

20. But even if we regard the reliance on hearsay evidence appropriate here,[4] Surber must be disqualified. Although an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1989), the Commission requires "reasonable assurance" of committed funding to construct the proposed facility and to operate for three months without revenue. The application form utilized by Surber (*see* FCC Form 301, Instructions, Section III) provided as follows:

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

Additionally, the certifications specifically required by Questions 1 and 2 of Section III, FCC Form 301, were as follows:

> 1. The applicant certifies that sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment or credit: (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment . . . .

See JAM Communications, Inc., 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989).

21. Additionally, *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989) holds:

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue . . . .
>
> * * *
>
> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds.

22. Most recently, the Commission declared in *Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562 (1990) (emphasis added; footnotes omitted):

> In *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), the Commission held that applicants need not have in hand [necessarily complete] documentation when certifying their financial qualifications; instead, they can prepare and submit such documentation after certification when requested to do so by the Commission. *Id.* at 5518-5519. Such documentation must reflect that the applicant has reasonable assurance of the lender's financial ability to provide the necessary funds when it certified its financial qualifications. To do this, the applicant

must provide substantial and reliable evidence (such as a financial statement or balance sheet) that the lender -- when it is a person and not a financial institution - - had sufficient net liquid assets on hand to meet its loan committment to the applicant. *Moreover, where that loan agreement is oral such as in this case, the existence of such an agreement at the time of financial certification must be established by both the applicant and lender via uncontroverted affidavits and/or testimony at hearing.*

23. And, as the Board has indicated in *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (1990) and *A. P. Walter, Jr.*, FCC 90R-82, released September 18, 1990:

> Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been primarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

24. The record here establishes that Surber did not possess "reasonable assurance" of funds from FNB (or any other institution or source) at the time she amended her application and affirmatively certified her financial qualifications. Knowing that she did not possess such "reasonable assurance" on the deadline date for filing her application, she filed her original FCC Form 301 indicating that she was not financially qualified. She subsequently contacted two other financial institutions, but to no avail. Then, based solely on her husband's conversation with Sharp, and on the last possible day for amending her application "as a matter of right," she affirmatively certified that she was so qualified. However (and putting aside the hearsay aspects of the Sharp conversation), Ted Surber admitted that he knew at the time of his conversation with Sharp that (1) Sharp would not provide any kind of documentation to Surber; (2) there was no discussion as to terms of repayment, or even interest rates; and (3) Sharp could not approve any loan because "he was only one member" of the FNB loan committee. Based upon these concessions alone, Janice Surber could not have, in good faith, affirmatively certified her financial qualifications.

25. In a markedly similar proceeding, *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990), the Board was presented with a situation where the ALJ added only a financial "misrepresentation" issue. We there held that a remand was not necessary to include a specific financial "qualifications" issue, because "the record contains sufficient considerations of [the applicant's] financial qualifications, and that a remand would serve no useful purpose." *Id.*, at 2858-2859. Although the *Boedker* ALJ believed that a basic financial "qualifications" issue was necessarily subsumed under the financial "misrepresentation" issue he had there added, the original ALJ assigned to this proceeding determined that a basic financial qualifications issue was not warranted (*see* note 1, *supra*). Nevertheless, as in *Boedker*, a remand here is not necessary because all of the available evidence relative to "the facts and circumstances relating to the certification of Janice Fay Surber" has been adduced under the express terms of the issue added by the original ALJ. Surber had more than adequate notice that the basis, *vel non*, of her financial certification was being tried. And, key witness Sharp has now expired, making any remand superfluous and likely unproductive *sans* his testimony.

26. In sum, we find that, based upon the uncontroverted record evidence, Surber was not financially qualified to construct and operate her proposed facility at the time she affirmatively certified her application. Her sole reliance on what her husband told her of a conversation with a bank official (and indeed, the contents of that *very* conversation), prove conclusively that her certification was false. Even viewed most favorably, the evidence reflects that Surber was merely invited to file an ordinary loan application. No such loan application was submitted to the bank; the bank did not review or approve her collateral; and there was no discussion of repayment or interest rates.[5]

27. Having found that the evidence of record overwhelmingly demonstrates that Surber has not met the objective standard of "reasonable assurance" of a bank loan, we need not reach the more subjective question of whether Surber knowingly intended to deceive the Commission when she certified her application in the affirmative based upon her husband's brief and meaningless conversation with Sharp, *see Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (Rev. Bd. 1989), *aff'd*, FCC 90-320, released October 4, 1990, although we are highly skeptical that Surber truly believed she had "reasonable assurance" of a "present firm intention" of FNB to make funds available to her. As the Board observed in *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3199 (Rev. Bd. 1990):

> [We] have often denied applications on financial grounds, based on objective evidence, without reaching the more subjective question of whether there also existed a conscious intent to deceive when the applicant certified. *See e.g., Marlin Broadcast of Central Florida, Inc.*, 4 FCC 7945, 7948 (Rev. Bd. 1989), *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985).

28. *Exceptions to McAnally's Basic Qualifications* : Surber argues that the ALJ erred in refusing to add financial qualifications and misrepresentation issues against McAnally, based upon alleged conflicting testimony given by McAnally during deposition. Surber claims that McAnally first stated at deposition that he was relying on his own personal funds, then later "assets in both [his and his wife's] names." However, Surber asserts, McAnally was not relying on joint assets, but upon assets (of his wife) "in which he had no ownership interest at all." (Surber Contingent Exceptions at pps. 4-5.)

29. In denying Surber's request to enlarge issues, the ALJ, in his *Memorandum Opinion and Order*, FCC 88M-3937, released November 21, 1988, held, *inter alia*, that "McAnally's wife has represented that prior to [McAnally's certification] she had agreed, and continues to agree, that her assets could be used by her husband to finance the construction and operation of the proposed station." Absent any evidence that Mrs. McAnally's pledge is disingenuous, the ALJ's resolution was correct. *See Armando Garcia*, 3 FCC Rcd 1065, 1066 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 4767 (1986). We have also reviewed McAnally's deposition and find no "inconsistencies" raising substantial and material questions of fact sufficient to require the addition of issues and a remand here. *See* 47 CFR §1.229(d). Rather, we agree with McAnally that many of the alleged "inconsistencies" were engendered by counsel's cross-examination, and the framing of the questions put to McAnally.

30. Surber's remaining exception to McAnally's basic qualifications relates to the ALJ's failure to add "misrepresentation/lack of candor and/or abuse of process issues against McAnally." (Surber Contingent Exceptions at 10.) She claims that McAnally engaged in a telephone conversation with J. Will Sharp (the FNB officer) on May 8, 1988, and subsequently made a transcript of that telephone conversation. Surber argues that this transcript (McAnally's rejected Exhibit 6) should have been disclosed pursuant to Surber's earlier-filed motions for production of documents. However, McAnally did not produce the transcript until April 18, 1989, when he submitted his direct case exhibits.

31. McAnally responds that the first ALJ ruled in *Memorandum Opinion and Order*, FCC 88M-4387, released December 23, 1988, that "it is not appropriate to require McAnally to produce hearing exhibits at this stage of *the proceeding." Thus, "counsel interpreted the foregoing language to mean that the Sharp conversation was exempt from production because it was intended to be used as a hearing exhibit." (McAnally Reply. at p. 8.) McAnally also claims (*id.*, at p. 9):[6]

> Unlike Surber, McAnally had not had an issue added against him, was not attempting to protect his application from dismissal and was not attempting to conceal anything. Indeed, McAnally was happy for Surber and the Presiding Judge to see his Exhibit 6, and was not attempting to conceal material that Surber could use for exculpatory purposes. McAnally Exhibit 6 clearly showed that Surber had received no reasonable assurance of financing whatever at the time of her certification. McAnally's Opposition lastly noted that there was no prejudice to Surber as a result of any delay in the receipt of the Sharp telephone transcript. McAnally mailed it to Surber, as he had always intended, together with the rest of his direct case exhibits on the financial qualifications issue against her on April 18, 1989. This date was three weeks before the originally-scheduled date for the hearing in this case and over *four months* before the hearing ultimately took place. Furthermore, the content of the transcript simply reinforced what Sharp stated more generally in the August 5, 1988 Declaration that accompanied McAnally's Second Motion to Enlarge Issues against Surber. Surber can neither complain that she was surprised by the content of the transcript nor prejudiced by the timing of its production.

32. At the June 2, 1989 pre-hearing conference, the ALJ advised that would not add Surber's requested issues, declaring (Tr. 41): "This doesn't appear to be any intentional deception. It appears to be confusion and, perhaps, misunderstanding on the part of counsel, but I don't see intentional concealment, and there's no apparent prejudice that I am aware of here."[7] We agree with the ALJ's disposition of this matter, and find no substantial and material questions of fact requiring a remand. *See* 47 CFR § 1.229(d).

33. *Conclusions* : With the disqualification of Surber, McAnally is the only remaining qualified applicant in this proceeding. Thus, it is not necessary to reach the comparative attributes of the parties, and McAnally's application will be granted.

34. ACCORDINGLY, IT IS ORDERED, That the application of Janice Fay Surber (File INo. BPH-870313NB) IS DENIED, and the application of Fate Lamont McAnally (File No. BPH-870313NE) for a new FM facility to serve Jellico, Tennessee IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] In response to McAnally's request for a basic financial qualifications issue against Surber, that *Order* opined (at para. 6 and n.5) that:

> McAnally's request for an issue to determine whether Surber is financially qualified will be denied. Surber, in her opposition, has submitted a letter dated July 7,1988, from the Bank of Williamsburg, agreeing to a loan to Surber for construction and operation of the proposed station. In view of this showing, the specification of a financial issue is not warranted.
>
> * * *
>
> McAnally's contention that Surber was required to file a petition for leave to amend to submit the Bank of Williamsburg loan commitment, is rejected. When an applicant certifies that they are financially qualified, such applicant is not required to amend the application with respect to the specifics of the financial plan.

> The ALJ's action here was incorrect. Because we find that Surber did not have "reasonable assurance" of her financial qualifications when she amended and certified her application on May 1, 1987, she was not entitled to rely on a bank letter submitted more than one year later to support her earlier certification. *See Marlin Broadcasting of Central Florida, Inc.*, FCC 90-320, released October 4, 1990. An applicant must have "reasonable assurance" at the time it certifies. *See Northampton, infra.*

[2] We note that this letter from FNB does not, *inter alia*, (1) specify an interest rate; (2) specify terms of repayment; and, (3) identify specific collateral required. *See Scioto Broadcasters*, 5 FCC Rcd 5158, 5161 (Rev. Bd. 1990). Indeed, the letter indicates only that Mr. Yates " *feel* [*s*] that the Farmers National Bank *would have an interest* in financing the project . . . *sometime in the future* . . . ." *See* para.15, *supra* ; emphases added. This is not "reasonable assurance." *See Rebecca L. Boedker, supra.*

[3] Loron Baker testified at hearing, and the ALJ found that his declaration had been prepared at McAnally's request (Tr. 303). McAnally had checking and savings accounts with the bank, as well as two or three loans (Tr. 299, 403-404), and Baker had helped McAnally take out a loan in 1987 for his AM radio station (Tr. 299-300, 302-303). In obtaining the declaration, McAnally told Baker that he had applied for the Jellico FM license and that there was some dispute over whether Surber had complied with FCC regulations. He told Baker that Surber had represented to the FCC that she had a "firm loan commitment" or "binding contract" with FNB to obligate funds for construction and operation of the station (Tr. 304-306). Baker testified that he told McAnally that FNB had expressed an interest in making the loan to Surber (Tr. 311-312); but because he was concerned that the bank not suffer a binding commitment, he provided McAnally with his declaration that the Yates letter was an "accommodation" to Surber. Baker explained at hearing that his description of the letter as an "accommodation" referred to the fact that the letter was an initial contact indicating a possibility that Surber might obtain a loan, and that the bank had an interest in making it, contingent upon an initial review of Surber's financial statement (Tr. 307-308, 311). Baker also testified that although Yates, as an officer, was authorized to issue the June 2 letter, that letter was not legally binding (Tr. 310-311); and before a loan could actually be advanced, Surber's loan request would have to go to the loan executive committee for final approval (Tr. 313-314). Baker described the Yates letter as an invitation to pursue the matter further, an expression of preliminary interest, and testified that if Surber met all of the bank's requirements she could get a loan (Tr. 332). Baker testified he was not sure whether McAnally had ever discussed with him the concept of "reasonable assurance" rather than an enforceable loan commitment (Tr. 322). (I.D., paras. 30-32.)

[4] Under no circumstances would we accord very much weight to the Surbers' hearsay testimony without also requiring consideration of McAnally's Exhibit 6 (containing the exceedingly adverse comments of Sharp to McAnally). This exhibit was rejected as hearsay by the ALJ. McAnally's Exhibit 6, said to be the transcript of a May 8, 1988, telephone conversation between McAnally and Sharp, is surely no less reliable under hearsay precepts than Surbers' self-serving narrations; and to the degree that the ALJ relied upon the latter, the former seems at least equally as probative. While we do not consider the substance of the transcript in our disposition of this issue (it is wholly unnecessary in any event), we would require the ALJ to admit and consider McAnally's hearsay conversation with Sharp and balance it with the Surber hearsay, were it necessary to remand to decide whether Mrs. Surber improperly certified her finances.

[5] Despite the fact that Surber provided nothing to FNB that would have permitted even the most preliminary assessment of her eligibility of a loan the size she sought, Surber's pleadings do not cite or rely upon *MultiState Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), for the proposition that her financial status was so perfectly known to the bank that it could make a "firm commitment" without reviewing any ordinary application data. Even if Surber had made this argument, she could not force-fit into the *Multi-State* mold. First, the *Multi-State* applicant had a letter in hand from a Chase Manhattan vice president stating a willingness to lend $4 million (on a New York City VHF television station worth several hundred million dollars), setting forth in detail the interest rate, repayment period (and so forth, *see* 590 F.2d at 1118), a letter the FCC had initially accepted as adequate (*id.*, at 1120). Second, Chase Manhattan and its vice president averred that the bank was "personally and favorably acquainted" with several of the prominent New York City luminaries who held stock in that applicant, and it conditioned its willingness on the "continued participation in your venture of substantially all of the stockholders named in your application" (*id.*, at 1118). None of these characteristics appertain to Surber's application, which perhaps accounts for her failure to invoke *Multi-State*.

[6] McAnally's footnote to this statement also claims:

> Because Sharp did not ultimately testify at the hearing, the ALJ properly refused to accept the exhibit. Unfortunately, and as detailed in McAnally's Exceptions herein, by admitting Mr. and Ms. Surber's hearsay accounts about Sharp's alleged statements, he unfairly and erroneously accepted hearsay testimony from Surber on the very same subject.

We have agreed, *see* note 4, above.

[7] This bench ruling was memorialized by *Order*, FCC 89M-1621, released June 8, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC.	File No. BPH-850712GV
BAY SHORE COMMUNITY BROADCAST ASSOCIATES, LTD.	File No. BPH-850712US
BAY SHORE BROADCASTING CORPORATION	File No. BPH-850712UT
Patricia Prie, Barbara J. Hughley and Betty D. Fox d/b/a FIRE ISLAND BROADCASTING	File No. BPH-850712UW
KANDEL BROADCASTING CORPORATION	File No. BPH-850712VA
Everett A. Reese, Roni W. Poole and C. Wallace Schandall d/b/a RPS COMMUNICATIONS	File No. BPH-850712VB
SUSAN LUNDBORG	File No. BPH-850712VE
SOUTH SHORE MEDIA CORPORATION	File No. BPH-850712VF

For Construction Permit for New FM Station, Channel 276, Bay Shore, New York

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 1990; Released: October 24, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is an Appeal, filed September 11, 1990 by Buckley Broadcasting Corporation (licensee of WDRC-FM, Hartford, Connecticut) from *Memorandum Opinion and Order*, FCC 90M-2770, released September 4, 1990, by Administrative Law Judge Richard L. Sippel (ALJ), denying Buckley's Petition to Intervene filed in the captioned proceeding on August 9, 1990.

2. *Background* : On May 10, 1990, the Commission released its *Memorandum Opinion and Order*, 5 FCC Rcd 2906 (1990), remanding this proceeding and requiring the ALJ to hear the following issue on an *expedited* basis:

> To determine if [all the captioned applicants] have reasonable assurance of the availability of their proposed antenna sites.

See 5 FCC Rcd at 2910. In this *Order*, the Commission noted that "the new site specified by several applicants is short-spaced with [Buckley's] Station WDRC-FM, Hartford, Connecticut . . . ." *Id.*, at 2906. With respect to this short-spacing problem, Buckley had filed (on September 13, 1989) a Petition to Delete Allotment and to Dismiss Applications concerning those applicants purportedly short-spaced to WDRC-FM. However, in its *Order*, the Commission did not make Buckley a party to the proceeding, dismissed its pending Petition, and observed (*id.*, at 2909; emphasis added):

> Whether the applicants can demonstrate their qualifications on the site availability issue being designated against them or demonstrate that waiver of the spacing requirements is warranted are questions to be explored before the ALJ, if the applicants make the specified good cause showing for amending their applications. *Buckley's Petition to Dismiss, therefore, will be dismissed without prejudice to its right to seek intervention in further proceedings before the ALJ.*

3. Nevertheless, Buckley did not file its Petition to Intervene with the ALJ until August 9, 1990, nearly three full months subsequent to the release of the Commission's *Order* remanding this proceeding. In denying Buckley's request for intervention, the ALJ found that Buckley "failed to show evidence of short-spacing"; and (apparently) did not demonstrate "how [its] participation as a party-intervenor will assist the Commission" in resolution of the issue. *Order*, released September 4, 1990, *supra* (at para. 9).[1]

4. *Discussion*: The Commission's Rules governing intervention are set forth at 47 CFR §§1.223(a)(b) and (c). Subsection (a) provides as follows:

> (a) Where, in cases involving applications for construction permits and station licenses, or modifications or renewals thereof, the Commmission has failed to notify and name as a party to the hearing

> any person who qualifies as a party in interest, such person may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest. Where such person's interest is based upon a claim that a grant of the application would cause objectionable interference under applicable provisions of this chapter to such person as a licensee or permittee of an existing or authorized station, the petition to intervene must be accompanied by an affidavit of a qualified radio engineer which shall show, either by following the procedures prescribed in this chapter for determining interference in the absence of measurements or by actual measurements made in accordance with the methods prescribed in this chapter, the extent of such interference. Where the person's status as a party in interest is established, the petition to intervene will be granted.

47 CFR §1.223(b) further provides that:

> (b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 30 days after the publication in the Federal Register of the full text or a summary of the order designating an application for hearing or any substantial amendment thereto. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular state of the proceeding.

Finally, 47 CFR §1.223(c), governing filings subsequent to the thirty-day limitation set forth in Subsections (a) and (b), *supra*, provides that (emphases added):

> (c) Any person desiring to file a petition for leave to intervene *later than 30 days* after the publication in the Federal Register of the full text or a summary of the order designating an application for hearing or any substantial amendment thereto shall set forth the interest of petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, *and must set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section.* Such petition shall be accompanied by the affidavit of a person with knowledge of the facts set forth in the petition, and where petitioner claims that a grant of the application would cause objectionable interference under applicable provisions of this chapter, the petition to intervene must be accompanied by the affidavit of a qualified radio engineer showing the extent of such alleged interference according to the methods prescribed in paragraph (a) of the section. If, in the opinion of the presiding officer, good cause is shown for the delay in filing, he may in his discretion grant such petition or may permit intervention limited to particular issues or to a particular state of the proceeding.

5. In its Appeal, Buckley offers no excuse for not filing its Petition to Intervene with the ALJ until some three-months subsequent to release of the Commission's May 10, 1990 *Order*. It does, however, attach a copy of its Reply to Oppositions to Petition to Intervene (as submitted to the ALJ on August 29, 1990). Noting that its opponents objected to Buckley's intervention on timeliness grounds before the ALJ, Buckley makes the following argument (Reply at 1-4; footnotes omitted):

> The parties opposing Buckley's Petition all argue that it is untimely. Their argument rests on the proposition that the Commission's May 10, 1990 *Memorandum Opinion and Order* [" *MO & O* "], 5 FCC Rcd 2906 (1990), which added site availability issues against each of the remaining applicants and directed the Presiding Judge to consider any requests for waiver of the Commission's mileage-separation requirements, constituted a "substantial amendment" to the *Hearing Designation Order* in this proceeding, 2 FCC Rcd 4201 (M.M. Bur. 1987), within the meaning of Section 1.223(a).
>
> However, none of the parties offer a scintilla of legal support for this novel proposition. Under their logic, a new thirty-day period for intervention would open every time the Commission or the Presiding Judge added issues against any of the parties to a comparative hearing. But that is not the definition of a "substantial amendment" to the designation order. Instead, a "substantial amendment" is "one which creates a new right to participate in the hearing process." *Lamar Life Broadcasting Co.*, 48 F.C.C. 2d 807, 811 (Rev. Bd. 1974).
>
> The Commission's May 10, 1990 *MO & O* did not create any new right to participate in this proceeding. From Buckley's standpoint, that right arose in July of 1989, when the surviving applicants first proposed the alternative site that is short-spaced to Buckley's station WDRC-FM, Hartford, Connecticut. Of course, Buckley could not have sought intervention within 30 days of that point -- the hearing was in abeyance at that point and continued to be so until at least May 10, 1990. The *MO & O*, therefore, did not vest any new right in Buckley to participate -- indeed, the Commission refused to allow Buckley to intervene at that point. It merely designated additional issues to be explored with respect to each of the applicants' technical proposals.
>
> In short, the Petition's opponents fundamentally misconstrue the nature of the May 10, 1990 *MO & O*. That decision conferred on Buckley no right of participation that did not exist before, and therefore did not trigger an additional thirty-day period within which Buckley was required to file its Petition. Thus, Buckley was perfectly justified in making its

timeliness showing with reference to the Commission's original *Hearing Designation Order* in this proceeding.

6. Buckley's Appeal will be denied. The Commission ordered this proceeding to be remanded to the ALJ on an *expedited* basis. It did not name Buckley as a party to the proceeding, but indicated that Buckley could seek intervention before the ALJ. The rules regarding intervention are unambiguous. Buckley has made no persuasive showing why it did not seek timely intervention, pursuant to 47 CFR §1.223; indeed, it does not even satisfactorily explain why it did not attempt to file its Petition to Intervene within 30-days of release of the Commission's *Order*. Buckley's untimely request for leave to intervene was properly denied by the ALJ. *See Golden State Broadcasting Corp.*, 92 FCC 2d 761, 763 (Rev. Bd. 1982); *cf. Whidbey Broadcasting Service, Inc.*, 5 FCC Rcd 8726 (1989) (untimely interference complaint rejected).[2]

7. ACCORDINGLY, IT IS ORDERED, That the Appeal filed September 11, 1990, by Buckley Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The ALJ also stated (at n. 6):

> Immediately after the Commission returned this case for litigation, the Presiding Judge called a prehearing conference and called for input on, *inter alia*, "the intervention of Buckley Broadcasting Corporation of Connecticut as a party." *See Order* FCC 90M-1184, released May 14, 1990. In view of Buckley's interest when the case was before the Commission, Buckley was probably watching the docket. It is surprising that Buckley had not immediately filed its petition on time for consideration at that conference. With a trial date set for October 5, 1990, it is exceedingly late to bring in a new party unless there is a clear showing that such person's participation was needed to reach a decision. Buckley has failed to make such a showing.

[2] Buckley, a non-party to this proceeding, remains free to file informal objections regarding its position. *See* 47 CFR §1.41. We assume that any such objections can be considered by the Commission's Mass Media Bureau and reflected in the public interest position it may choose to take in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-416

In re Applications of

THE PACIFIC FM LIMITED PARTNERSHIP (hereafter "Pacific FM")	File No. BPH-880505MJ
ARTHUR S. LIU (hereafter "Liu")	File No. BPH-880505MM
KEXT BROADCASTERS, INC. (hereafter "KEXT")	File No. BPH-880505NB
SPANGLISH COMMUNICATIONS, INC. (hereafter "SGI")	File No. BPH-880505NG
PATRICIA J. JACOBSEN d/b/a PEACOCK BROADCASTING (hereafter "Peacock")	File No. BPH-880505NL
VINCE LEE BROADCASTING LTD. (hereafter "Lee")	File No. BPH-880505NW
B. F. J. TIMM (hereafter "Timm")	File No. BPH-880505OE
RAYMOND W. CLANTON (hereafter "Clanton")	File No. BPH-880505OG
RADIO OXNARD, LIMITED PARTNERSHIP (hereafter "Radio Oxnard")	File No. BPH-880505OO
TOWNSEND BROADCASTING, INC. (hereafter "Townsend")	File No. BPH-880505OW
CHARLES S. NELSON (hereafter "Nelson")	File No. BPH-880505PK
OXNARD BROADCASTNG, INC. (hereafter "OBI")	File No. BPH-880504MG (DISMISSED HEREIN)
SHERRI LYNN MCKINNON (hereafter "McKinnon")	File No. BPH-880505OV (PREVIOUSLY RETURNED)
BORCHARD FM BROADCASTING CO., INC. (hereafter "Borchard")	File No. BPH-880505PA (PREVIOUSLY RETURNED)
1ST BROADCASTING, INC. (hereafter "1ST")	File No. BPH-880505PF (PREVIOUSLY RETURNED)

For Construction Permit
for a New FM Station on Channel 275A (102.9)
in Oxnard, California

ERRATUM

Released: October 22, 1990

The channel allocation in the caption of the Hearing Designation Order in Docket 90-416, Oxnard, California is corrected to read as follows:

For Construction Permit for a New FM
Station on Channel 275A (102.9)
in Oxnard, California

Paragraph 3 is changed to read as follows:

3. As originally filed, none of the applications indicated that they were not in compliance with the U.S.-Mexican Agreement. However, in their respective petitions for reconsideration, the three applicants essentially advance the same argument: The Commission erred in returning their applications because, (i) their proposals afforded full protection to all Mexican allotments and assignments, and (ii) their proposals complied with Commission rules because the proposals met the minimum separation requirements of § 73.207(b) as a Class B operation. Therefore, the applicants believe the Commission should have considered their applications as Class B proposals with respect to Mexico.

Paragraph 4 of the Order is changed to read as follows:

4. The Oxnard allocation is a Class A allotment, both domestically and under the U.S.-Mexican Agreement, for which only Class A facilities may be specified. McKinnon, Borchard and 1ST filed as Class A stations but specified facilites which exceed the maximum ERP/HAAT limit for Class A stations near the U.S.-Mexican border. Applications not in accordance with the U.S.-Mexican Agreement

are not acceptable for filing. Under the Commission's "hard look" processing standards adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), applications must be acceptable at the close of the amendment as of right period. A request that Commission staff unilaterally obtain Mexican clearance for an application not filed in accordance with the Agreement is, in essence, a request for waiver of our "hard look" requirements. Thus, having denied such requests and returned the applications as unacceptable for filing after the end of the amendment of right period had passed, the staff acted properly in this matter. Accordingly, McKinnon's, Borchard's and 1ST's petitions for reconsideration will be denied.

Footnote 3 of the Order is corrected to read as follows:

By letter filed March 15, 1990, OBI made an untimely request that the Commission coordinate the Oxnard allotment with Mexico as either a Class B or C facility. In view of the discussion in paragraph 4, above, OBI's request, even if timely, would be denied.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-451

In the Matter of

Amendment of Section 73.202(b), RM-7237
Table of Allotments,
FM Broadcast Stations.
(Laramie, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Jay Lellman (petitioner) seeking the allotment of FM Channel 283C2 to Laramie, Wyoming, as that community's fourth local FM service. Petitioner stated his intention to apply for the channel, if allotted.

2. A staff engineering analysis has determined that Channel 283C2 can be allotted to Laramie in conformity with the minimum distance separation requirements of the Commission's Rules with a site restriction of 0.9 kilometers (0.6 miles) north of the city.[1]

3. In view of the fact that Laramie could receive a fourth local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Laramie, Wyoming	236C, 275C, 288A	236C, 275C 283C2, 288A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 13, 1990,** and reply comments on or before **December 28, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jay Lellman
P.O. Box 1307
Eau Claire, WI 54702

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Katleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates used for Channel 283C2 at Laramie, Wyoming, are 41-19-09 and 105-34-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-367

In the Matter of

Amendment of Section 73.202(b), RM-6835
Table of Allotments,
FM Broadcast Stations.
(Klondike, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6520 (1990), proposing the allotment of Channel 253A to Klondike, South Carolina, in response to the petition for rule making filed by Sandlapper Broadcasting (petitioner). Comments expressing a continuing interest in use of the channel were not received from the petitioner or any other party.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest expressed, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Sandlapper Broadcasting to allot Channel 253A to Klondike, South Carolina, IS DISMISSED. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-364

In the Matter of

Amendment of Section 73.202(b),	RM-6796
Table of Allotments,	RM-7158
FM Broadcast Stations.	
(Plantersville and Pawley's Island, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Carocom Media (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6514 (1989), proposing the allotment of Channel 253A to Plantersville, South Carolina, as its first local FM service. Petitioner filed comments withdrawing its interest in use of the channel at Plantersville and instead counterproposing the allotment of Channel 253A to Pawley's Island, as its second local FM service. It filed reply comments reiterating its intention to apply for the channel, if allotted to Pawley's Island.[2] No other comments were received.

2. We believe the public interest would be served by allotting Channel 253A to Pawley's Island, South Carolina, since it could provide the community with its second local FM service. Channel 253A can be allotted to Pawley's Island in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.2 miles) northeast to avoid a short-spacing to Station WWKT-FM, Channel 252A, Kingstree, South Carolina, and to the pending applications for Channel 255C2 at McClellanville, South Carolina.[3]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 6, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pawley's Island, South Carolina	253A, 262A

4. The window period for filing applications will open on **December 7, 1990,** and close on **January 7, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Pawley's Island has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on November 3, 1989, Report No. 1800.

[3] The coordinates for this allotment are North Latitude 33-29-18 and West Longitude 79-05-32. Although the petition for Plantersville was filed prior to the effective date of the new spacing requirements, the counterproposal was filed after October 2, 1989. Therefore, the applicants are expected to comply with the current spacing requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-507

In the Matter of

Amendment of Section 73.202(b), RM-6946
Table of Allotments,
FM Broadcast Stations.
(Breaux Bridge, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8143 (1989), issued in response to a petition filed by JBC, Inc. (petitioner), proposing the substitution of FM Channel 243C3 for Channel 243A at Breaux Bridge, Louisiana. Petitioner also requested modification of its construction permit (BPH-851115NL) for Channel 243A to specify operation on Channel 243C3. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 243C3 for Channel 243A at Breaux Bridge, Louisiana, since it would provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site located 18.9 kilometers (11.7 miles) west of the community.[1] In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the construction permit for Channel 243A to specify operation on Channel 243C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 6, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Breaux Bridge, Louisiana	243C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 243A, Breaux Bridge, Louisiana, IS MODIFIED to specify operation on Channel 243C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 243C3 are 30-13-00 and 92-05-00. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-619

In the Matter of

Amendment of Section 73.202(b), RM-7048
Table of Allotments,
FM Broadcast Stations.
(Bridport, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 76 (1990), issued at the request of Peter S. Morton (petitioner), proposing the allotment of Channel 229A to Bridport, Vermont, as that community's first local FM service.[1] Comments were not received from the petitioner in response to the *Notice*, nor did any other party express an interest in the proposed allotment at Bridport.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Since there has been no such interest expressed in the proposed use of Channel 229A at Bridport, we shall dismiss it. *See, e.g., Joshua Tree, CA*, 54 Fed. Reg. 18557, published May 1, 1989; *Senatobia, MS*, 3 FCC Rcd 4000 (1988); *Bradford, VT*, 2 FCC Rcd 6964 (1987); and paragraph 2 of the Appendix to the *Notice*.

3. In view of the above, IT IS ORDERED, That the petition of Peter S. Morton (RM-7048), requesting a channel allotment at Bridport, Vermont IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Although petitioner requested the allotment of Channel 243A to Bridport, the Commission proposed Channel 229A to avoid a potential conflict with a separate proposal to allot Channel 244A to Vergennes, Vermont, in MM Docket No. 89-602.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-452

In the Matter of

Amendment of Section 73.202(b), RM-7424
Table of Allotments,
FM Broadcast Stations.
(Aguila, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed by Michael R. Hagans (petitioner) seeking the allotment of FM Channel 242A to Aguila, Arizona, as its first local broadcast service. Petitioner stated a willingness to apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Aguila is not listed in the U.S. Census.[1] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Aguila has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Oak Grove, Florida*, 5 FCC Rcd 3774 (1990); *Hannibal, Ohio*, 5 FCC Rcd 3315 (1990); *Statenville, Georgia*, 5 FCC Rcd 2685 (1990); *Columbia, California*, 5 FCC Rcd 2003 (1990); and *Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989).

3. A staff engineering review of the proposal reveals that Channel 242A can be allotted to Aguila consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2] However, since Aguila is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain the concurrence of Mexico in the proposal.

4. We believe the public interest would be served by proposing the allotment of Channel 242A to Aguila, Arizona, if it is ultimately found to be a community for allotment purposes, since an interest has been expressed in providing that locality with a first local broadcast service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Aguila, as follows:

	Channel No.	
City	Present	Proposed
Aguila, Arizona	--	242A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 13, 1990,** and reply comments on or before **December 28, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Michael R. Hagans
1705 N. Queensbury St.
Mesa, AZ 85201

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Aguila is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 600 persons. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

[2] Coordinates used for Channel 242A at Aguila are 33-56-30 and 113-10-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-453

In the Matter of

Amendment of Section 73.202(b), RM-7337
Table of Allotments,
FM Broadcast Stations.
(Columbus, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1990; Released: October 22, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Saturn Communications, Inc. (petitioner), requesting the substitution of FM Channel 287C3 for Channel 252A at Columbus, Kansas. Petitioner also requests modification of its license for Station KOCD(FM), Channel 252A, to specify operation on Channel 287C3.

2. We believe petitioner's proposal warrants consideration. Channel 287C3 can be allotted to Columbus, Kansas, in compliance with the Commission's spacing requirements at a site 11.8 kilometers (7.3 miles) south of the community.[1] We shall propose to modify the license of Station KOCD(FM), Channel 252A, as requested by the petitioner, to specify operation on Channel 287C3. However, in accordance with Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the Class C3 allotment, the modification cannot be implemented unless an equivalent class channel is also allotted.

3. In order to provide a wide coverage area station for Columbus, Kansas, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Columbus, Kansas	252A	287C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 13, 1990,** and reply comments on or before **December 28, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barbara L. Waite
Venable, Baetjer,
Howard & Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(Counsel to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287C3 are 37-04-02 and 94-50-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-424

In re Applications of

WESTERN CITIES BROADCASTING, INC. File No. BRH-891201XU
For Renewal of License of Station KQKS(FM) on Channel 282C1 at Longmont, Colorado

AMADOR S. BUSTOS File No. BPH-900228MB
For a Construction Permit for a New FM Broadcast Station on Channel 282C1 at Longmont, Colorado

LONGMONT BROADCASTING CORPORATION File No. BPH-900216MA
For a Construction Permit for a New FM Broadcast Station on Channel 282C1 at Longmont, Colorado

Michael L. Glaser d/b/a SAINT VRAIN COMMUNICATIONS CO. File No. BPH-900228MA (PREVIOUSLY DISMISSED)
For a Construction Permit for a New FM Broadcast Station on Channel 282C1 at Longmont, Colorado

WESTERN CITIES BROADCASTING, INC. File No. BLH-890104KC
For a License to Cover Minor Changes to Station KQKS(FM), Longmont, Colorado

HEARING DESIGNATION ORDER

Adopted: September 28, 1990; Released: October 22, 1990

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the above-captioned application for a construction permit for a new FM broadcast station on Channel 282C1 at Longmont, Colorado, filed February 28, 1990, by Amador S. Bustos ("Bustos"); (b) the above-captioned application for a construction permit for a new FM broadcast station on Channel 282C1 at Longmont, Colorado, filed February 16, 1990, by Longmont Broadcasting Corporation ("LBC"); (c) the above-captioned application for renewal of license of Station KQKS(FM), Longmont, Colorado, filed December 1, 1989, by Western Cities Broadcasting, Inc. ("Western"); (d) a Petition to Deny the KQKS(FM) license renewal application, filed March 1, 1990, by Bustos; (e) a Petition to Deny the KQKS(FM) license renewal application, filed February 20, 1990, and Supplements thereto, filed February 28, 1990, and March 29, 1990, by LBC; (f) a Consolidated Opposition to Petitions to Deny, filed March 14, 1990, and an Opposition to Second Supplement to Petition to Deny, filed April 20, 1990, by Western; (g) a Reply to Consolidated Opposition to Petitions to Deny, filed March 29, 1990, and a Reply to Opposition to Second Supplement to Petition to Deny, filed May 3, 1990, by LBC; (h) a Reply to Consolidated Opposition to Petitions to Deny, filed March 26, 1990, by Bustos; (i) a Petition for Partial Reconsideration and Clarification, filed December 29, 1988, by Western, of a December 27, 1988, staff letter ruling granting Western a construction permit containing a condition requiring Western to resolve interference caused by the operation of KQKS(FM); (j) a Joint Opposition to Petition for Partial Reconsideration and Clarification, filed January 9, 1989, by Boulder Communications ("Boulder") and William J. Schueller d/b/a Eldorado Communications ("Eldorado"); (k) a Reply to Joint Opposition to Petition for Partial Reconsideration and Clarification, filed January 23, 1989, by Western;[1] (l) the above-captioned application for a license to cover minor changes to KQKS(FM), filed January 4, 1989, by Western; (m) a Petition to Deny License Application and Revoke Operating Authority, filed January 31, 1989, and a Supplement thereto, filed February 1, 1989, jointly by Boulder and Eldorado; (n) a Motion to Strike Boulder's and Eldorado's Petition to Deny, filed February 9, 1989, by Western; (o) an Opposition to Motion to Strike, filed February 23, 1989, jointly by Boulder and Eldorado; (p) a Reply to Opposition to Motion to Strike, filed March 6, 1989, by Western; (q) a Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*, filed May 7, 1990, by Michael L. Glaser d/b/a Saint Vrain Communications Co. ("Saint Vrain"); (r) an Opposition to Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*, filed June 4, 1990, by Bustos; (s) an Opposition to Petition for Reconsideration and Reinstatement of Application, filed June 4, 1990, by LBC; and, (t) a Consolidated Reply to Oppositions to Petition for Reconsideration and for Reinstatement, filed June 13, 1990, by Saint Vrain.[2]

2. *Application of Saint Vrain Communications Co.* By letter dated April 3, 1990, the Chief, FM Branch, Audio Services Division, Mass Media Bureau, notified Saint Vrain that, under the Commission's "hard look" policy,[3] Saint Vrain's application was insufficient for tender and was being returned because it did not include a transmitter site certification. The staff letter also informed Saint Vrain that its March 5, 1990, amendment providing a site certification was procedurally defective and could not be considered because it was filed after the close of the relevant filing window.

3. In its Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*, Saint Vrain argues that the staff erred in returning its application because the Commission's "hard look" policy does not apply to FM applications that are mutually exclusive with license renewal applications of existing stations. In support, Saint Vrain relies on the *Report and Order* which, according to Saint Vrain, restricted application of the "hard look" policy to

applications filed for new allotments. Alternatively, Saint Vrain posits that if the Commission intended the "hard look" policy to apply to applications in contested renewal proceedings, the Commission violated the Administrative Procedures Act by failing to provide adequate notice to the public of such intention. Saint Vrain also claims that the "hard look" policy is invalid as applied to any application for a new FM station; acceptance of the Saint Vrain application will not, in any event, violate the "hard look" policy; and the "hard look" policy, as applied against Saint Vrain, is unconstitutional because it will deny Saint Vrain due process of law.

4. In their oppositions, Bustos and LBC argue that the Commission's "hard look" policy applies to all FM applications; that no distinction should be drawn between applications that are filed in comparative new proceedings and those filed in contested renewal cases. Bustos and LBC rely for their position on Appendix D[4] of the *Report and Order*, in which they contend that the Commission clearly indicated that the "hard look" policy would apply to *all* applications filed for commercial FM frequencies and did not restrict its applicability to applications filed in comparative new proceedings.

5. In the *Report and Order*, the Commission adopted a strict (so-called "hard look") policy requiring all commercial FM applications to be "substantially complete" at the time they are tendered for filing. Appendix D to the *Report and Order* provided a detailed list of the criteria utilized by the staff in evaluating the substantial completeness of applications. Appendix D stated, *inter alia*, that the failure to include a site certification would render an application insufficient for tender and result in return of the application.

6. As explained more fully in the *Report and Order*, the "hard look" policy was adopted to prevent carelessly prepared, unprocessable applications from burdening the processing system. Under the previous system of processing commercial FM applications, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. The Commission observed that the discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing trouble-free proposals. *Report and Order*, 58 RR 2d at 782, ¶ 23. Given the underlying rationale for adopting the policy, applying the "hard look" policy to all commercial FM applications -- including those filed in contested renewal proceedings -- is entirely consistent with and furthers the Commission's stated goals. Neither the *Report and Order* nor Appendix D suggest that the "hard look" policy should not be applied to proposals filed in contested renewal proceedings. Although the policy was adopted in conjunction with the Commission's creation of new FM allocations in MM Docket No. 80-90, Appendix D clearly stated that the strict processing guidelines would apply to commercial FM applications.[5] *See* also *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC From 301)*, 4 FCC Rcd 3853, 3859, n. 71 (1989) (specifically included applications filed in contested renewal proceedings as among those subject to Commission's "substantially complete" tenderability standard of review). Applications for noncommercial educational FM facilities constitute the only category of FM applications that is specifically excluded in the *Report and Order* from processing under the "hard look" policy. 58 RR2d at 776 n.3.[6] Based on the foregoing, Saint Vrain's request for reconsideration and reinstatement of its application will be denied.

7. *Mutually Exclusive Applications*. Bustos and LBC propose to operate their respective new stations on Channel 282C1, the channel on which KQKS(FM) presently operates. Consequently, because Western's application for renewal of license of KQKS(FM) and the applications of Bustos and LBC for construction permits are mutually exclusive, these applications will be designated for a hearing in a comparative proceeding to determine which, if any, should be granted.

8. Bustos and LBC propose to place their transmitting antennas on an existing tower atop El Dorado Mountain in Jefferson County, Colorado. While both indicated that they complied with the Commission's guidelines on radiofrequency radiation, we are unable to reach the same conclusion. Our study indicates that neither proposal, when combined with the effects of colocated KBCO-FM (Boulder, Colorado), will meet these limitations. Both applicants state that they plan to construct a fence at a distance of 26 meters from the base of the tower. Our study indicates that this distance will not enable either applicant to comply with the applicable guidelines. Accordingly, the applicants are required to amend their applications within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines.[7] The cumulative effect of the respective proposed operations and all nearby RF sources must be considered. Therefore, since Bustos and LBC's proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, both will be required to submit to the presiding Administrative Law Judge within 30 days of the release of this Order the environmental impact information described in 47 C.F.R. § 1.1311. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of Bustos and/or LBC's environmental assessments that the proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. *See* Section 1.1308(d) of the Commission's Rules.

9. Bustos (on August 17, 1990) and LBC (on July 31, 1990) have both furnished information that the Northwest Mountain Region of the Federal Aviation Administration has determined that their respective proposals are considered hazards to air navigation because of the potential of electromagnetic interference to aeronautical electric equipment. Accordingly, the appropriate issue will be specified.

10. *Petitions to Deny KQKS (FM) License Renewal Application*. Bustos, on March 1, 1990, and LBC, on February 20, 1990, filed petitions to deny Western's application for renewal of license of KQKS(FM). Bustos and LBC argue that various character-related issues are warranted against Western based on the *Initial Decision of Administrative Law Judge Walter C. Miller*, 4 FCC Rcd 5714 (1989) (" *ID* "). Therein, the Presiding Judge found

that Richard C. (Rick) Phalen, Western's controlling shareholder, was an undisclosed real party-in-interest in an application for a new FM broadcast station at Montecito, California, filed by his daughter, Shawn Phalen. *See* MM Docket No. 87-426.

11. The referenced *Initial Decision* does not constitute a final adjudication. Therefore, to the extent that Bustos and LBC seek denial of Western's renewal application based on the Presiding Judge's conclusions in the Montecito proceeding, their petitions will be denied. However, if a final adjudication is rendered in the Montecito proceeding in which it is determined that Richard C. (Rick) Phalen was an undisclosed real party-in-interest in his daughter's application, such a determination would indeed raise material and substantial questions about Western's qualifications to be or remain a Commission licensee. Therefore, a *contingent* issue will be specified herein against Western. Additionally, in the event Western's captioned application for renewal of license of KQKS(FM) is granted prior to the issuance of a final decision in the Montecito proceeding, such grant shall be conditioned upon the outcome of the Montecito case.

12. *Western's Petition for Partial Reconsideration and Clarification.* On January 16, 1987, Western received Special Temporary Authority ("STA") to locate the KQKS(FM) transmitting antenna on a tower owned by Eldorado and located on Eldorado Mountain. Boulder, which operates land mobile repeater facilities, maintained its antennae on the Eldorado tower at the time. On April 30, 1987, Western filed an application (File No. BPH-870430IB) for a construction permit wherein it requested authority to operate KQKS(FM) on a permanent basis from the Eldorado tower with a slightly higher effective radiated power than that authorized in the STA. Eldorado and Boulder opposed Western's application, alleging, *inter alia*, that KQKS(FM)'s operation from the Eldorado tower was causing harmful interference to Boulder's co-located communications facilities.[8]

13. By letter, dated December 27, 1988, the Chief, Audio Services Division, Mass Media Bureau, determined that KQKS(FM) was "the source of all the destructive interference to the facilities of the other Commission licensees located on Eldorado Mountain." However, the staff also determined that "[w]hile not of such a nature or extent to preclude grant of a construction permit, the interference, nonetheless, must be corrected."[9] Accordingly, Western was issued a construction permit containing a condition which required Western to resolve all outstanding interference problems caused by the operation of KQKS(FM). The letter ruling also cancelled the STA.

14. Two days later, on December 29, 1988, Western filed a Petition for Partial Reconsideration and Clarification of the December 27, 1988, letter ruling. Western claimed that: (a) it was unaware of any evidence submitted to the Commission that would support a finding that KQKS(FM) was the source of interference; (b) the staff did not intend its letter ruling to constitute an agency determination that interference existed and/or that Western was the source of such interference; and (c) if the staff did intend the letter ruling to constitute such an agency determination, it had failed to clearly articulate its findings and the reasons therefore. Boulder and Eldorado, on January 9, 1989, filed a joint opposition to Western's petition, and, on January 23, 1989, Western filed a reply pleading.[10]

15. Section 1.110 of the Commission's Rules provides that an applicant that objects to a construction permit containing conditions other than those requested, must, within 30 days of the grant, file a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing.[11]

16. Western accepted the grant continued to operate KQKS(FM), after its STA had been cancelled, pursuant to the program test authority derived from its construction permit, and, on January 4, 1989, one week after filing its Petition for Partial Reconsideration and Clarification, Western filed the above-captioned application for a covering license. Thus, Western not only failed to request rejection of the construction permit, it unquestionably accepted the authorization as made by seeking a license to cover it. Section 1.110 does not allow an applicant to first accept a conditional grant and later seek reconsideration of the conditions therein. *See Central Television, Inc. v. FCC*, 834 F.2d 186 (D.C. Cir. 1987); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 739 (D.C. Cir. 1974). Given the foregoing, Western must be deemed to have effectively abandoned its Petition for Partial Reconsideration and Clarification. Therefore, the petition will be dismissed as moot.

17. *Western's Application for a Covering License.* As noted, *supra*, on January 4, 1989, Western filed the above-captioned application for a covering license. Eldorado and Boulder, on January 30, 1989, jointly filed a Petition to Deny License Application and Revoke Operating Authority. They alleged that: (a) Western had not resolved the interference caused by KQKS(FM), as required by the condition in its construction permit; (b) as a result, Western committed a misrepresentation in its response to Section I, Item 2 of the license application;[12] and (c) Western is basically unqualified to be a Commission licensee. Eldorado and Boulder filed a supplement to their Petition on February 1, 1989. On February 9, 1989, Western filed a Motion to Strike Eldorado's and Boulder's joint petition.[13] Boulder and Eldorado opposed Western's Motion to Strike on February 23, 1989, and Western submitted a reply thereto on March 6, 1989.

18. By letter, dated March 3, 1989, the Chief, Audio Services Division, Mass Media Bureau, citing 47 U.S.C. § 309(d)(1) and 47 C.F.R. § 73.3584(a), determined that the joint petition to deny Western's license application was procedurally defective, and it considered the petition as an informal objection, pursuant to 47 C.F.R. § 73.3587. Action on the informal objection was withheld, however, pending receipt from Eldorado and Boulder of additional, specific information about the interference allegedly caused by KQKS(FM).

19. Eldorado and Boulder subsequently provided information to the staff demonstrating that Western had failed to eliminate the interference caused by the operation of KQKS(FM). Accordingly, by letter, dated April 6, 1989, the Chief, Audio Services Division, Mass Media Bureau, ordered KQKS(FM) to "immediately reduce power."[14]

20. Western's January 4, 1989 representation in its license application that it had complied with all of the terms and conditions in its construction permit *issued one week earlier* -- including the condition to eliminate interference -- is apparently inconsistent with the staff's subsequent finding of continued interference and its order requiring KQKS(FM) to immediately reduce power. This

inconsistency raises a material and substantial question as to whether Western committed a misrepresentation or lacked candor in its license application. Accordingly, an appropriate issue will be specified herein to explore this matter further at hearing.

21. ACCORDINGLY, IT IS ORDERED, That Boulder and Eldorado are MADE PARTIES to this proceeding.

22. IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge, at a time and place to be specified in a subsequent Order, upon the following issues:

(a) If a final environmental impact statement is issued with respect to Bustos and/or LBC in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

(b) To determine whether there is a reasonable possibility that the proposals of Bustos and LBC would constitute a hazard to air navigation.

(c) To determine whether Western committed a misrepresentation or was lacking in candor in its response to Section I, Item 2, of its application (FCC Form 302) for a license to cover minor changes to KQKS(FM) and the effect(s) thereof on Western's qualifications to be a Commission licensee.

(d) If a final decision is rendered in the Montecito, California, proceeding (MM Docket No. 87-426), in which it is determined that Richard C. (Rick) Phalen was an undisclosed real party-in-interest in the application of his daughter, Shawn Phalen, to determine the effect(s) thereof on Western's qualifications to be a Commission licensee.

(e) To determine which of the captioned mutually exclusive applications for authority to operate on Channel 282C1 at Longmont, Colorado, would, on a comparative basis, best serve the public interest; and

(f) To determine, in light of the evidence adduced pursuant to the foregoing issues which, if any of the captioned mutually exclusive applications to operate on Channel 282C1 at Longmont, Colorado, should be granted.

(g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application of Western for a license to cover minor changes to KQKS(FM) should be granted.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 8 hereinabove, Bostos and LBC shall submit the environmental assessment assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

24. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

25. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence as to Issue (c) shall be on Boulder and Eldorado, and the burden of proof as to Issue (c) shall be on Western; and the burden of proceeding with the introduction of evidence as to Issue (d) shall be on Bustos and LBC, and the burden of proof as to Issue (d) shall be on Western. The burdens with respect to the remaining issues specified above shall be governed by Section 1.254 of the Commission's Rules.

26. IT IS FURTHER ORDERED, That, for the reasons discussed more fully in ¶¶ 10 and 11, *supra*, in the event Western's captioned application for renewal of license of KQKS(FM) is granted prior to the issuance of a final decision in the Montecito, California, proceeding (MM Docket No. 87-426), such grant SHALL BE CONDITIONED upon the outcome of that proceeding.

27. IT IS FURTHER ORDERED, That the Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*, filed May 7, 1990, by Saint Vrain IS DENIED;

28. IT IS FURTHER ORDERED, That the Petition to Deny the KQKS(FM) license renewal application, filed March 1, 1990, by Bustos, IS DISMISSED in part and GRANTED in part.

29. IT IS FURTHER ORDERED, That the Petition to Deny the KQKS(FM) license renewal application, filed February 20, 1989, and Supplements thereto, filed February 28, 1990, and March 29, 1990, by LBC, ARE DISMISSED in part and GRANTED in part.

30. IT IS FURTHER ORDERED, That the Petition for Partial Reconsideration and Clarification, filed December 29, 1988, by Western IS DISMISSED.

31. IT IS FURTHER ORDERED, That the Petition to Deny License Application and Revoke Operating Authority, filed January 31, 1989, and a Supplement thereto, filed February 1, 1989, jointly by Boulder and Eldorado, ARE DENIED.

32. IT IS FURTHER DIRECTED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

33. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the parties herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the release of this *Order*, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

34. IT IS FURTHER ORDERED, That the parties herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay
Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] This pleading was, apparently inadvertently, entitled "Reply to Opposition to Joint Opposition to Petition for Partial Reconsideration and Clarification."

[2] There are also pending an application for consent to the transfer of control of Western from Richard C. Phalen to First Capital Corporation of Chicago (File No. BTCH-890616HR), and related pleadings, including a Petition to Certify Issues to the Commission En Banc, filed September 1, 1989, jointly by Boulder and Eldorado. Consideration of all matters related to the application for transfer of control will be held in abeyance pending resolution of the issues specified herein. *See, Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

[3] *See Report and Order in MM Docket No. 84-750*, 58 RR 2d 776 (1985) (" *Report and Order* ").

[4] Reprinted at 58 RR 2d 166 (1985).

[5] 58 RR 2d at 166, n. 1.

[6] Similarly, Saint Vrain's other arguments are entirely without merit. Thus, adoption of the "hard look" policy indeed was a proper exercise of Commission discretion; the "hard look" policy in fact remains in effect; the lack of a site certification clearly constitutes a tenderability defect; reinstating Saint Vrain's application despite its fatal deficiency would be blatantly inconsistent with prior Commission actions in which numerous other applications have been returned for failing to comply with the criteria set forth in Appendix D; and application of the "hard look" policy with regard to applications filed in contested renewal proceedings does not represent what Saint Vrain characterizes as "unconstitutional retroactive legislation."

[7] *See* OST Bulletin No. 65 (October 1985).

[8] Section 2.1 of the Commission's Rules defines "harmful interference" as "[i]nterference which endangers the functioning of . . . safety services or seriously degrades, obstructs, or repeatedly interrupts a radiocommunication service. . . ."

[9] The staff letter, citing the Commission's long-standing "newcomer" policy, specifically held Western "responsible, financially and otherwise, for correcting all the interference caused to facilities operating at the site prior to the arrival of KQKS-FM." As explained in the December 27, 1988, correspondence, the "newcomer" policy dates back to *Midnight Sun Broadcasting Co.*, 11 FCC 1119 (1947), in which the Commission held a broadcaster responsible for resolving interference caused by its new facilities to other preexisting facilities in close proximity. In further support, the staff letter also cited *Sudbrink Broadcasting of Georgia*, 65 FCC 2d 691 (1977); *Jesse Willard Shirley*, 24 RR 2d 982 (1972); *Western Slope Communications, Ltd.*, Mimeo No. 4431 (released May 31, 1983); *Jack Straw Memorial Foundation*, 35 FCC 2d 397, *recon. denied* 37 FCC 2d 544 (1972); and *Broadcast Corp. of Georgia (WVEU-TV)*, 96 FCC 2d 901 (1984).

[10] In its reply, Western conceded that the KQKS(FM) signal "can, at times, be heard in the background of certain two-way communications using facilities which are located on Eldorado Mountain. However . . . while there is clear evidence of a phenomenon existing which causes KQKS' signal to be heard in the background of some two-way communications, there is no evidence that this phenomenon constitutes 'destructive interference,' or is even properly characterized as 'interference' of the sort that the Commission regulates." (footnote omitted) Reply, p. 3.

[11] Alternatively, an applicant could reject a grant in its entirety and seek reconsideration of the action granting the application pursuant to Section 1.106 of the rules.

[12] Section I, Item 2, of the application (FCC Form 302) inquires: "Have all the terms, conditions, and obligations set forth in the above-described construction permit been fully met?" Western responded in the affirmative, without explanation.

[13] Because Western moved to strike the joint petition in lieu of opposing it on the merits, Western requested the opportunity to file an opposition in the event its Motion to Strike is denied, in whole or in part. Western's request will be denied. Western had its opportunity to respond within the time afforded by the Commission's Rules. The Commission's Rules do not contemplate multiple opportunities to respond to a particular pleading.

[14] By letter, dated April 12, 1989, Western was authorized temporarily to return KQKS(FM) to full operating power because of what the staff determined was Boulder's and Eldorado's unreasonable refusal to permit KQKS(FM) to take appropriate measures to resolve the interference problems. By letter dated, June 8, 1989, the staff determined that Western had made adequate progress toward eliminating the interference, and it authorized Western to continue operating KWKS(FM) at full power until further notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-475

In the Matter of

Amendment of Part 22 of the
Commission's Rules to Allow Public
Mobile Service Applicants to
Commence Construction After Filing
FCC Form 401, but Prior to
Receiving an Authorization

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1990; Released: October 22, 1990

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. On August 2, 1989, the Commission issued a *Report and Order* (*Report and Order*) [1] amending Part 22 of the Commission's rules to allow certain Public Mobile Service (PMS) applicants to begin constructing facilities after filing an application (FCC Form 401) and without receiving prior Commission authorization, as long as certain conditions are met. McCaw Cellular Communications, Inc. (McCaw) and Alascom, Inc. (Alascom) have filed petitions for reconsideration of the *Report and Order*. A petition for partial reconsideration has been filed by Centel Cellular Company (Centel). Bell Atlantic Mobile Systems, Inc. (BAMS) has filed comments in support of the McCaw and Centel petitions.

2. The *Report and Order* adopted a new Section 22.43(d) permitting applicants in the domestic public cellular radio telecommunications service (cellular) and the public land mobile service (PLMS or non-cellular) to construct facilities after filing a Form 401 application but prior to receiving Commission authorization. The rule also contains the conditions under which an applicant may construct prior to receiving a grant of its authorization.[2]

II. PARTIES' COMMENTS

3. Alascom requests that the Commission reconsider its *Report and Order* to allow Rural Radio Service applicants to commence construction prior to receiving Commission authorization. Alascom argues that the remote areas of Alaska it serves, where there are no local exchanges, are accessible only by plane or boat and only during certain times of the year. Thus, Alascom contends that the installation of facilities needs to be accomplished as rapidly as possible to avoid missing the construction season.

4. McCaw and BAMS request reconsideration of the *Report and Order* regarding the antenna marking and lighting condition in the amended rules. These parties contend that the Commission should modify the rules to allow applicants to obtain the required antenna marking and lighting authorization solely from the FAA instead of also obtaining it from the FCC. According to McCaw and BAMS, this modification would not endanger air safety and would avoid duplicative decisions by the FCC's Antenna Survey Branch (ASB) to issue marking and lighting requirements which are also issued by the FAA. McCaw believes that reliance on the ASB as the final source of marking and lighting specifications prior to the applicant engaging in pre-authorization construction will result in significant delays that will eliminate the benefits intended in the *Report and Order*.[3] If the Commission rejects the proposed revision, McCaw argues that the Commission should determine how the ASB could process applications more efficiently to minimize the delays reported by Public Mobile Service applicants.

5. In addition, McCaw and BAMS maintain that there is an ambiguity in the Commission's new rules regarding ASB clearance. The *Report and Order*, 4 FCC Rcd at 5962, states that applicants must obtain antenna marking and lighting specifications from the Commission pursuant to Part 17 of the rules. The petitioners note, however, that §17.14 of the Commission's rules exempts applicants proposing some antenna structures from FAA notification.[4] Under these circumstances, McCaw and BAMS contend, no ASB clearance should be required. Petitioners ask the Commission to clarify that applicants are allowed to proceed with pre-authorization construction if they propose construction of an antenna structure which is exempted under §17.14 of the Commission's rules.

6. Centel seeks reconsideration of that portion of the *Report and Order* which provides that a cellular applicant may not commence construction prior to the grant of an authorization where its application proposes a *de minimis* extension[5] of its CGSA beyond the borders of its cellular market. *See* 47 C.F.R. §22.43(d)(3)(iii). Centel believes that the adoption of this restriction will substantially reduce the ability of cellular applicants to modify their systems expeditiously in response to market demand. According to Centel, the Commission's reason for prohibiting pre-grant construction of cellular facilities proposing a *de minimis* extension of a cell contour is inadequate. In the *Report and Order*, the Commission stated that this restriction is warranted because the "Commission needs to determine [prior to construction] whether the proposed extension is in fact *de minimis*." *Report and Order*, 4 FCC Rcd at 5962. Centel argues that if the Commission ultimately determines that a proposed extension is not *de minimis*, it could simply order the applicant to modify its facilities to reduce or eliminate the extension. Centel states that, at the very least, the Commission should permit pre-grant construction where the licensee in the adjacent market has consented to the extension and the adjacent market licensee's CGSA includes the extension area.

7. BAMS agrees with Centel and adds that the restriction precluding pre-grant construction facilities proposing *de minimis* extensions would unnecessarily delay service to the public when adjacent CGSAs have been combined and 39 dBu contour extensions are permitted pursuant to filing of an FCC Form 489[6] rather than FCC Form 401 or when the *de minimis* extension is into an adjacent RSA market in which the permittee has, by letter, consented to the extension.

III. DISCUSSION

A. Rural Radio Service

8. Alascom requests that the pre-authorization construction rule should be extended to the Rural Radio Service for the same reasons the Commission adopted the rule for other PMS applicants. In the *Report and Order* the Commission adopted rule changes that would apply to applicants in the domestic public cellular radio telecommunications service and the public land mobile service in large part because the comments exclusively addressed the cellular and public land mobile services.[7] We find no reason to exclude some classes of PMS applicants from the pre-authorization construction rule. Thus, we are revising §22.43 (d)(1) to apply to all applicants in the public mobile service[8] as defined in the Commission's rules. 47 C.F.R. §22.2.[9]

B. Air Safety Requirements

9. McCaw and BAMS object to the requirement that applicants obtain clearance for the construction of proposed towers from the FAA and marking and lighting specifications from the Commission. As we stated in the *Report and Order*, Section 303(q) of the Communications Act of 1934, 47 U.S.C. §303(q), authorizes the Commission to require marking and lighting of radio towers when, in the Commission's judgment, the towers may be a hazard to air navigation. This section also authorizes the Commission to require the owner of a tower to dismantle and remove the tower when the FAA determines that there is a reasonable possibility that it may constitute a menace to air navigation. The FAA itself, however, has no authority to limit or prohibit proposed construction it believes to be dangerous to air navigation. 49 U.S.C. § 1501, 1655 (c)(1). Given this statutory framework, and the need to prevent air safety hazards, compliance with Commission marking and lighting requirements is important. In addition, any delay ASB clearance may entail should be negligible, particularly given the fact that applicants must, in any event, generally wait a 60 to 90 day period prior to constructing.[10]

10. We agree with McCaw and BAMS, however, that paragraph 26 of the *Report and Order* read with rule §22.43(d)(3)(iv) creates an ambiguity. We are amending the rule to make clear that, as with Part 22 applicants generally, applicants who propose pre-authorization construction are not required to obtain ASB clearance if the proposed antenna structures are exempted from FAA notification under §17.14 of the Commission's rules.

C. Extension Outside of Cellular Market

11. In the *Report and Order*, the Commission announced that we would not allow applicants to construct prior to receiving a Commission authorization where applicants propose "a *de minimis* extension of the CGSA beyond the borders of the cellular market, as allowed by Section 22.903 of the rules . . . ." We stated that it was necessary that applications proposing such extensions be reviewed prior to construction to determine whether the proposed extension is, in fact, *de minimis*. On reconsideration, we agree with petitioners that allowing pre-grant construction of facilities where *de minimis* extensions are proposed would expedite service to the public and allow cellular operators and applicants to modify their systems quickly in response to market demand. As Centel states, major amendments proposing to expand existing cellular systems often propose at least some *de minimis* extension beyond the boundaries of the market. These minor extensions are often unavoidable when an operator is attempting to serve fringe areas of a market. Therefore, we are revising the rule to permit pre-authorization construction where the applicant proposes a *de minimis* extension of its CGSA or 39 dBu contour.[11] We remind applicants that any construction completed prior to grant of an authorization is performed at the applicant's own risk. If the Commission denies the request for a *de minimis* extension, the applicant will be required to modify its facilities to conform with Commission requirements.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED that the petitions for reconsideration filed by McCaw Cellular Communications, Inc. and Alascom, Inc. and the petition for partial reconsideration filed by Centel Cellular Company ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that Part 22 of the Commission's Rules IS AMENDED as shown in the Appendix below;

14. IT IS FURTHER ORDERED that the revised rule changes made WILL BECOME EFFECTIVE **December 7, 1990.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

APPENDIX

FINAL RULE

PART 22 - PUBLIC MOBILE SERVICE

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 22.43 is amended by revising paragraphs (d)(1), (d)(1)(i), (d)(1)(ii), (d)(1)(iii), (d)(1)(vi), (d)(1)(vii), (d)(3)(iv), (d)(3)(vi) and (d)(4)(iii), removing paragraph (d)(3)(iii), adding new paragraph (d)(1)(viii). Paragraphs (d)(3)(iv) through (d)(3)(vii) are redesignated as paragraphs (d)(3)(iii) through (d)(3)(vi) to read as follows:

Section 22.43 Period of construction.

* * * * *

(d) Commencing Construction Prior to Grant of a Radio Station Authorization.

(1) Scope. Paragraph 22.43(d) applies to all Public Mobile Service (PMS) applicants as defined in Section 22.2 and as set forth in paragraphs (i) - (viii):

(i) Applicants for an initial station authorization in the PMS;

(ii) Applicants for a non-permissive change of an existing station authorization in the PMS, *see* §22.9(a) of the rules;

(iii) Applicants who have filed applications or amendments which request expansion of the reliable service area of a PMS base station facility by less than one mile. *Cf.* §22.23(c)(2) of the rules;

* * * * *

(vi) Applicants seeking authorization to expand an existing Cellular Geographic Service Area (CGSA), pursuant to Section 22.9(a) of the rules, within the boundaries of their market, both during the exclusive five year fill-in period, and after the fill-in period has expired, *see* §22.31 (a)(1)(i), (f) of the rules;

(vii) Applicants seeking an initial cellular authorization after the exclusive five year fill-in period has expired, *see* §22.31(a)(1)(i), (f) of the rules;

(viii) Applicants seeking authorization for a *de minimis* extension of an existing or proposed CGSA or 39 dBu contour beyond the borders of the cellular market, *see* §22.903 of the rules;

* * * * *

(3) * * *

(iii) The applicant, where required (and not exempted under §17.14 of the rules), has not filed a notice of proposed construction with the FAA, and has not received a determination from the Commission as to any required antenna structure marking and lighting specifications;

* * * * *

(vi) For non-cellular applicants, the proposed facility will be located between line A and the United States-Canadian border, *see* §§1.955, 22.117(b)(2) of the rules; or a facility to be operated in the 931-932 MHz band will be located in any of the areas indicated in Note C, *infra*; and

* * * * *

(4) * * *

* * * * *

(iii) *Applications and amendments to expand the reliable service area of a non-cellular base station by less than one mile.* Applications and amendments which request expansion of the reliable service area of a non-cellular base station facility by less than one mile, *see* §22.43(d)(1)(iii), shall not be subject to the general rule set out in §22.43(d)(2)(i). Rather, once the applicant has mailed the Form 401 to the Commission, the applicant may commence construction provided that the requirements of §22.43(d)(3) have been met.

* * * * *

FOOTNOTES

[1] *Amendment of Part 22 of the Commission's Rules*, 4 FCC Rcd 5960 (1989).

[2] These conditions, set out in §22.43(d), include: (1) no petitions to deny or mutually exclusive applications have been filed; (2) the applicant has not requested waiver of a Commission rule; (3) the application does not propose a *de minimis* extension of a CGSA; (4) when required, the applicant must file a notice of proposed construction with the Federal Aviation Administration (FAA) and receive antenna marking and lighting specifications from this Commission; (5) the proposed construction must not have a significant environmental impact; (6) the proposed site must be far enough from the Canadian and Mexican borders to avoid conflicting with international agreements; and (7) the applicant must not initiate construction prior to a time period set forth in the rules which varies depending on the type of application involved.

[3] At the very least, the parties suggest, increased coordination between the FAA and the Commission could make the process of issuing marking and lighting specifications for antenna structures more efficient.

[4] Generally, § 17.14 of the Commission's rules does not require notification to the FAA for construction or alteration of antenna structures which will be adequately shielded, which are 20 feet or less in height, or which are facilities or devices approved by the FAA. 47 C.F.R. §17.14.

[5] The cellular rules generally prohibit a licensee from extending its CGSA outside of its own market unless it obtains the consent of the adjacent market licensee. The Commission does permit, however, a *de minimis* extension into the adjacent market in circumstances where the extension does not enter into a central MSA, and where the applicant has justified the extension in its application.

[6] We note that under §22.9 of the rules, 39 dBu contour extensions are permitted with the filing of Form 489, where adjacent CGSAs have been combined.

[7] *Report and Order*, 4 FCC Rcd at 5966 n. 3.

[8] Pursuant to Section 22.2 of the Commission's rules, PMS includes Public Land Mobile, Rural Radio, Air-Ground Radio Telephone, Offshore Radio, and Cellular Radio Telecommunications Services.

[9] The Notice of Proposed Rule Making (NPRM) is clearly broad enough to provide adequate notice of this change. Notice of Proposed Rule Making, *Amendment of Part 22 of the Commission's Rules*, 3 FCC Rcd 6303 (1988).

[10] Generally, PMS applicants must wait 90 days from the date of the public notice listing the application as acceptable for filing before they may begin construction, *See* §22.43(d)(2)(i); and cellular tentative selectees must wait 60 days from the date of the public notice announcing them as tentative selectees before they may commence construction. *See* §22.43(d)(4). While we recognize there are exceptions, ASB clearance normally is sought, and obtained or not, within this time period.

[11] The extension of a 39 dBu contour outside of its presently authorized CGSA is considered a change in the applicant's CGSA. *See* §22.903(d). We are deleting §22.43(d)(3)(iii) and add-

ing a new §22.43(d)(1)(viii) to reflect our reconsidered rule. In addition, we are making minor editorial changes to certain paragraphs of §22.43(d) as set forth in the appendix.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-459

In the Matter of

Amendment of Section 73.202(b), RM-7386
Table of Allotments,
FM Broadcast Stations.
(Clovis, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Alton Lloyd Finley, Jr. ("petitioner") requesting the allotment of Channel 272C3 to Clovis, New Mexico, as the community's fifth local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 272C3 can be allotted to Clovis in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 272C3 to Clovis, New Mexico, since an interest has been expressed in providing the community with an additional local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clovis, New Mexico	256C1, 260C1, 268C, 298C1	256C1, 260C1, 268C, 272C3, 298C1

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 14, 1990,** and reply comments on or before **December 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alton Lloyd Finley, Jr.
Rural Route 5, Box 442-M
Seneca, South Carolina 29678
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 36-24-06 and West Longitude 103-12-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-458

In the Matter of

Amendment of Section 73.202(b), RM-7475
Table of Allotments,
FM Broadcast Stations.
(Taos, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Taos County Radio ("petitioner") requesting the substitution of Channel 260C for Channel 260C2 at Taos, New Mexico, and the modification of its construction permit for Station KRBJ to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 260C, if allotted.

2. Channel 260C can be allotted to Taos in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.6 kilometers (17.7 miles) south of the community to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 260C. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 260C at Taos, New Mexico, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 260C for Channel 260C2 at Taos, New Mexico, since it could enable Station KRBJ to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Taos, New Mexico	260C2, 268C2	260C, 268C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 14, 1990,** and reply comments on or before **December 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephen E. Coran, Esq.
Brown Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 260C at Taos are North Latitude 36-09-30 and West Longitude 105-29-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-457

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Zolfo Springs, Florida)	RM-7389

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Ted L. Hite ("petitioner"), seeking the allotment of Channel 295A to Zolfo Springs, Florida, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. An engineering analysis has determined that Channel 295A can be allotted to Zolfo Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 14 kilometers (8.7 miles) south of the community.[1] This site restriction will avoid a short-spacing to Station WXXL(FM), Leesburg, Florida.

3. We believe the public interest would be served by proposing the allotment of Channel 295A to Zolfo Springs, since the community could receive its first local FM service. Accordingly, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Zolfo Springs, Florida	–	295A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 14, 1990,** and reply comments on or before **December 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 27-22-00 and West Longitude 81-48-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-456

In the Matter of

Amendment of Section 73.202(b), RM-7396
Table of Allotments,
FM Broadcast Stations.
(Warrenton, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Radio Warrenton ("petitioner"), permittee of Channel 226A at Warrenton, Georgia. Petitioner requests the substitution of Channel 226C3 for Channel 226A at Warrenton, and modification of its construction permit (BPH-890613MH) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 226C3 for Channel 226A at Warrenton, Georgia, since this would provide the community with its first wide coverage area FM station. Channel 226C3 can be allotted to Warrenton in compliance with the Commission's minimum distance separation requirements, with a site restriction of 13.4 kilometers (8.3 miles) west of the city.[1] The site restriction is necessary in order to avoid a short-spacing to a proposal to allot Channel 226A to Station WKWQ(FM), Batesburg, South Carolina, and to the licensed site of Station WSNT(FM), Channel 228A, Sandersville, Georgia.

3. As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 226C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest for use of Channel 226C3 at Warrenton or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the above, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Warrenton, Georgia	226A	226C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 14, 1990,** and reply comments on or before **December 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arthur V. Belendiuk
Smithwick & Belendiuk, P.C.
2033 M Street, N.W., Suite 207
Washington, D.C. 20036
(Attorney for Radio Warrenton)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 33-21-35 and West Longitude 82-47-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-455

In the Matter of

Amendment of Section 73.202(b), RM-7356
Table of Allotments,
FM Broadcast Stations.
(Bloomer, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Starcom, Inc. ("petitioner"), requesting the substitution of FM Channel 236C3 for Channel 236A at Bloomer, Wisconsin. Petitioner also requests modification of its construction permit (BPH-880421MI) for Station WPHQ(FM) to specify Channel 236C3.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal could provide Bloomer with a wide coverage area FM station. Channel 236C3 can be allotted to Bloomer, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the construction permit of Starcom, Inc. for Station WPHQ(FM) to specify operation on Channel 236C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Bloomer or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believes it appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Bloomer, Wisconsin	236A	236C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 14, 1990** and reply comments on or before **December 31, 1990** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Bodorff
Edward A. Yorkgitis, Jr.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 236C3 are 45-00-30 and 91-19-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-601

In the Matter of

Amendment of Section 73.202(b), RM-7072
Table of Allotments,
FM Broadcast Stations.
(Chase City, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 41 (1990), issued in response to a petition filed by Patricia B. Wagstaff ("petitioner") proposing the substitution of FM Channel 260C3 for Channel 260A at Chase City, Virginia. Petitioner also requested modification of her construction permit for Channel 260A to specify operation on Channel 260C3. Petitioner filed supporting comments in which she reaffirmed her interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 260C3 for Channel 260A at Chase City, Virginia, since it would provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the construction permit's present transmitter site.[1] In addition, we are modifying the petitioner's construction permit for Channel 260A, Chase City, Virginia, to specify operation on Channel 260C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 7, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Chase City, Virginia	260C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 260A, Chase City, Virginia, IS MODIFIED to specify operation on Channel 260C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 260C3 are 36-48-13 and 78-21-02. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail herself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-454

In the Matter of

Amendment of Section 73.202(b), RM-7436
Table of Allotments,
FM Broadcast Stations.
(Clearwater, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1990; Released: October 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Central K Communications ("petitioner"), requesting the allotment of Channel 254A to Clearwater, Kansas, as that community's first FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated its intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration because the allotment could provide a first FM broadcast service at Clearwater. Channel 254A can be allotted to Clearwater, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 7.3 kilometers (4.5 miles) southwest of the community.[1] The site restriction will prevent a conflict with Channel 256C1, Station KBUZ, El Dorado, Kansas.[2]

3. In view of the above, the Commission believes it would be in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Clearwater, Kansas	---	254A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 14, 1990,** and reply comments on or before **December 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stanley G. Emert, Jr.
Bryce & Emert
412 Executive Tower Drive
Post Office Box 52225
Knoxville, Tennessee 37901
(counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 254A are 37-27-21 and 97-33-48.

[2] Station KBUZ was upgraded from Channel 256C2 to Channel 256C1 in MM Docket 89-476, effective June 30, 1990. *See* 5 FCC Rcd 3517 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-120

In the Matter of

Flexible Allocation of Frequencies
in the Domestic Public Land Mobile
Radio Service for Paging and Other
Services

ORDER ON RECONSIDERATION OF SECOND REPORT AND ORDER (PART I)

Adopted: October 5, 1990; Released: October 23, 1990

By the Commission:

1. Before us are a Petition for Clarification filed by Telocator of the *Second Report and Order* (*Flexible Paging II*), 4 FCC Rcd. 6415 (1989), and comments in support of the petition filed by PacTel.[1] No other responsive pleadings were filed to Telocator's petition.

I. BACKGROUND AND CONTENTIONS

2. In *Memorandum Opinion and Order in Docket No. 18261*, 47 Rad. Reg. 2d (P&F) 539 (1980), the Commission allocated one or two UHF-TV channels in the 470 - 512 MHz band for two-way common carrier use to each of ten (later thirteen) specified metropolitan areas.[2] The Commission made the frequencies available on a shared basis. By 1984, use of the frequencies began to decline sharply due to the introduction of cellular service in the largest Metropolitan Statistical Areas (MSAs).

3. In *Flexible Paging II*, the Commission unpaired and reallocated the 470-512 MHz band frequencies not needed for existing two-way service to one-way control use [3] by control stations serving four or more base stations, amending Sections 22.501(j), (k), and (l) of the Rules. Telocator's Petition for Clarification proposes modified procedures for licensing control channels in the 470 - 512 MHz band.[4] Telocator suggests that the control channels be licensed utilizing procedures similar to those utilized in licensing 900 MHz channels:

a) Each applicant would specify from which UHF-TV channel a proposed control frequency should be taken, but is not permitted to specify a particular frequency.

b) Each applicant must demonstrate, in accordance with the rules, how the operations at the proposed site will not interfere with television reception.

c) All applications for operation within a specified TV channel within a given market would be deemed mutually exclusive.

d) The Commission would assign a particular frequency from the TV channel specified by the applicant.

e) If there are more applications than available frequencies, the Commission would hold a lottery among all applicants for frequencies from the specified TV channel.

4. PacTel, in its comments, proposes a two-phase filing process:

a) Any licensee of a wide-area common carrier mobile system with four or more transmitters, or an applicant for such a system, may request a single 470-512 MHz control frequency during the first phase of filings.

b) During the first filing phase, persons desiring to apply for more than one 470-512 MHz control frequency for a wide-area common carrier mobile system which serves four or more transmitters may do so, but only to replace existing 72-76 MHz or 900 MHz control frequencies, with the replaced control frequencies becoming available for reassignment upon construction of the 470-512 MHz system.

c) After disposition of the first phase filings, a second filing phase would be opened under the standard filing rules, and so on until the frequencies are exhausted.

II. DISCUSSION

Application Procedures for Control Channels

5. Both Telocator and PacTel recommend that applicants should specify which TV channel they prefer, but that the Commission should choose the specific frequency. If more applications are received than there are frequencies available, the commenters suggest, a lottery should be held for each UHF-TV channel. We have carefully considered these suggestions, and reviewed our processing capabilities. We find that the suggestions have merit because they will result in a fair distribution of the control channels and will promote processing efficiency. Accordingly, we will adopt a procedural rule requiring applicants to specify the UHF-TV channel they prefer, but not permitting applicants to specify the frequency.[5] The Commission will assign the specific frequency to an applicant, similar to the current procedures used to assign 900 MHz one-way paging frequencies. We find that this procedure is in the public interest because the frequencies within a UHF-TV channel are fungible for control purposes, and because utilizing this procedure will reduce the number of lotteries which need to be held from as many as forty-eight in the largest cities (one lottery per control frequency in the market) to a maximum of two per market (one lottery for each UHF-TV channel). In some market areas, a lottery will not be necessary if there are fewer applications than available frequencies.

6. PacTel is concerned that licensees who operate wide-area systems with many more than four transmitters might request one frequency for each set of four transmitter sites they operate, even though they intend to use each control channel on all of their transmitter sites. Thus, the

same licensee might apply for two, three, or more control channels even though all its transmitters are controlled in tandem. To avoid this situation, PacTel suggests that licensees be permitted to apply for only one control channel initially, but that if a licensee wished to apply for an additional control frequency during the first round of accepting applications, it could do so only if the additional frequency replaced an existing 72-76 MHz or 900 MHz control channel already licensed to the applicant. The replaced control channel would then be available to another carrier.

7. PacTel's suggestion has merit in part. There is a limited number of control frequencies, and it is our intention that all licensees with wide-area systems should have an opportunity to apply for at least one new control channel. We disagree with PacTel's recommendation, however, to require applicants for an additional 470 - 512 MHz control channel to give up an existing control channel in the 72 - 76 MHz or 900 MHz band. Licensees are making heavy use of their existing control channels, and absent a separate opportunity for notice and comment Rule Making or a revocation or renewal hearing to determine where the public interest lies, we do not believe that these licensees should be divested of their licenses. Instead, we believe it is equitable to give all licensees in an area an opportunity to receive at least one 470 - 512 MHz control frequency initially before we award a second control frequency to any licensee. Therefore, we will open a filing window, during which time all qualified applicants will be able to file for one control frequency per metropolitan area.[6] We expect that in most areas, there will be fewer applicants for an initial frequency than there are control frequencies available. However, in those instances where there are more applicants in the initial filing window than there are frequencies available, the applications will be set for lottery.

8. If there are frequencies still available after all qualified applications filed during the window have been granted, we will process applications for additional channels using a "rolling 60-day" filing procedure in accordance with existing rules and procedures for 900 MHz one-way paging applications. All applicants will be considered in the order in which they have filed. The first applicant to file after the close of the filing window will, from the date of its public notice, begin a 60-day filing period. If there are more applications within the 60-day filing period than there are frequencies available, all the timely filed applications will be considered mutually exclusive and will be set for lottery. If all applicants filing within that 60-day period can be granted a frequency without the use of a lottery, then the first application will be granted. Then the second applicant to file will be considered; if all applicants filing within sixty days of the public notice of the second application can be granted a frequency without resort to a lottery, then the second application will be granted, and so on. Whenever an application is reached which, together with applications filed within sixty days of its public notice date, cannot be granted because there is an insufficient number of frequencies remaining, that group of applications will be deemed mutually exclusive and will be subject to a random selection procedure.

9. There is one further point which should be addressed in connection with the fair distribution of control channels. Assuming both UHF-TV channels in a given area are equally useful as control channels, applicants will not know in advance for which channel their competitors will apply. As a result, there could be an uneven distribution of applicants between the two available UHF-TV channels, potentially resulting in a lottery for one channel while extra frequencies are available on the other channel. Accordingly, pursuant to Section 22.23(g)(2), applicants are permitted an opportunity to change the UHF-TV channel requested before a a lottery is held, as long as the frequency changes do not result in the need for a lottery for the second channel, or if there are not already more applicants than frequencies available in the second channel.[7]

10. Accordingly, as discussed above, we find that in the interests of fairness to applicants and processing efficiency, there will be a two-step licensing procedure for the UHF-TV control channels:

A. We will announce by public notice, simultaneously with release of this order, the initial filing window for applications for an initial control channel. We will accept applications for one UHF-TV control channel from licensees holding four or more transmitter sites on a wide-area system.

B. After all applications filed during this filing window have been granted, and if there are still frequencies left, we will license the remaining frequencies according to a "rolling 60-day" procedure.

III. ORDERING PARAGRAPHS

11. WHEREFORE, for the foregoing reasons, Part 22 of the Commission's Rules IS HEREBY AMENDED as discussed herein and as shown in the Appendix to this Order;

12. IT IS FURTHER ORDERED that applications for the UHF-TV frequencies WILL BE ACCEPTED in accordance with the procedures outlined herein;

13. IT IS FURTHER ORDERED that the Petition for Clarification filed by Telocator IS GRANTED to the extent discussed herein;

14. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX
RULES SECTION

Part 22 of the Code of Federal Regulations is amended as follows:

I. Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. §§154, 303), sec. 553 of the Administrative Procedure Act (5 U.S.C. §553), unless otherwise noted.

2. Section 22.501 is amended by adding paragraph (k)(6) to read as follows:

Section 22.501 Frequencies

* * * * *

(k) * * *

(6) An applicant for a control channel from among the frequencies listed in subparagraph (k)(4) shall not specify a frequency in its application. It may specify its frequency preference, but the Commission is not bound by such requests. Applicants may only apply for one frequency at a time. An applicant must specify from which television channel it wishes its control channel to come in areas with more than one television channel available.

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3. Section 22.31 is amended by adding paragraph (i) to read as follows:

Section 22.31 Mutually exclusive applications

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(i)(1) Notwithstanding other provisions of this section, all applications for control channels in the 470 - 512 MHz band filed pursuant to §22.501(k)(6) specifying the same television channel, will be deemed mutually exclusive and entitled to comparative consideration if there are more applications filed than there are available frequencies. Initially, applications will be accepted within a two-week period specified by public notice. If there are more applicants than frequencies available, the applications will be deemed mutually exclusive and subject to a random selection procedure.

(2) Any control channels remaining after the initial applications are granted will be assigned pursuant to a "rolling sixty-day" licensing procedure: all applicants filing after the close of the initial filing window will be considered in the order in which they have filed. The public notice of the first applicant to file after close of the filing window will begin a 60-day filing period. If there are more applications filed than frequencies available, the applications will be deemed mutually exclusive and subject to random selection procedures. If all applicants filing within that 60-day period can be granted a frequency without the use of random selection procedures, then the first application will be granted. Then the second applicant to file will be considered. If all applicants filing within sixty days of the second application's public notice date can be granted a frequency without resort to random selection procedures, then the second application will be granted, and so on. Whenever an application is reached which, together with applications filed within sixty days of its public notice date, cannot be granted because there is an insufficient number of frequencies remaining, that group of applications will be deemed mutually exclusive and will be subject to a random selection procedure.

FOOTNOTES

[1] Interelectronics, Inc. has also filed a petition for partial reconsideration of the decision in *Flexible Paging II* to reallocate all 470 - 512 MHz two-way mobile frequencies in the New York City/Northeastern New Jersey area to control use. This issue will be resolved in a subsequent order.

[2] The cities are Boston, Chicago, Cleveland, Dallas/Fort Worth, Detroit, Houston, Los Angeles, Miami, New York/Northeastern New Jersey, Philadelphia, Pittsburgh, San Francisco, and Washington D.C. Some of the thirteen cities received twelve paired frequencies from one UHF television channel, others received twenty-four paired frequencies from two UHF television channels.

[3] Section 22.2 of the Rules defines "control channel" as "[t]he channel used for transmission of digital control information from the base station to the mobile station or from the mobile station to the base station." "Control station" is defined as "[a] fixed point-to-point or point-to-multi-point station used to control a remote base station transmitter."

[4] The Commission, in *Flexible Paging II*, established eligibility standards for control channel applicants, but deferred announcement of application procedures to a public notice which was to be issued when the rule changes became final. In response to Telocator's Petition, however, we set out application rules herein.

[5] Telocator suggests that applicants demonstrate that no interference will be caused to television reception in accordance with the rules. Section 22.501(k)(5) already requires that television reception be protected. Section 22.15(a) requires that applicants demonstrate compliance with the technical requirements of the rules. Therefore, Telocator's request is already encompassed by the rules.

[6] An "applicant," of course, includes all companies which are directly or indirectly owned by a common company. *See* §22.13(a) of the Rules. Although we are permitting an applicant to file for only one 470 - 512 MHz frequency at a time, an applicant may file for multiple transmitter locations for that one frequency in the same metropolitan area.

[7] Section 22.23(g) states in pertinent part:

> An application will be considered to be a newly filed application if it is amended by a major amendment . . . except in the following circumstances:
>
> * * *
>
> (2) The amendment resolves frequency conflicts with other pending applications but does not create new or increased frequency conflicts.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-114

In the Matter of

Petition for adoption of a new
Section 68.314(h) of the
Commission's Rules

REPORT AND ORDER

Adopted: October 5, 1990; Released: October 24, 1990

By the Commission:

INTRODUCTION AND SUMMARY

1. This proceeding addresses comments filed in response to a Notice of Proposed Rule Making (NPRM)[1] issued in response to a petition filed by American Telephone and Telegraph Company (AT&T). AT&T's petition seeks to amend Part 68 of the Commission's rules to require return of answer supervision[2] by private branch exchanges (PBXs) and other systems that provide a similar function. [3] Part 68 is the Commission's program governing telephone equipment registration and permits direct electrical connection of customer-provided telephone equipment, systems and protective apparatus to the nationwide telephone network. AT&T's petition proposed adding a new subsection (h) to Section 68.314, entitled "Billing Protection," to ensure that customers placing direct-inward-dialing (DID)[4] calls to stations served by PBXs are properly billed. According to AT&T, toll fraud detection mechanisms have revealed that many PBXs are not returning answer supervision signals to telephone company billing equipment, leading to loss of millions of dollars of earned revenues.

2. Section 68.314 contains signal and electrical current levels CPE must present to the public switched network (PSN) in the on and off hook states. In its petition, AT&T explains that Section 68.314, as currently written, applies only to network configurations in which the local exchange carrier's central office powers the called station, or telephone. Normally, when the party answering a call lifts the telephone handset, the circuit between the caller and the central office is closed, causing current in the central office line and equipment. This current alerts the telephone company of a billable call and activates billing accounting equipment. When a PBX is used between the central office and the called station, however, continuous power is supplied to the central office by the PBX and to the stations behind it. In this configuration, the PBX must in some way "notify" the central office when the called station answers because simple circuit closure does not occur. Industry standards require that PBXs notify the central office by reversing the polarity of the line to the serving central office. According to AT&T, this does not always happen, which means some DID calls are completed without billing equipment activation.

3. AT&T relates that today's PBXs are software-controlled, which means that they may be programmed not to return answer supervision, or to return answer supervision for certain kinds of calls and not others. Although some PBX dealers or customers may themselves program PBXs not to return proper signalling, AT&T states, it believes the improperly optioned PBXs are installed unwittingly.

4. In the *NPRM*, the Commission proposed that a new subsection (h) be added to Section 68.314 which would exempt certain DID calls from the signalling requirement and exempt embedded CPE from the standard altogether. Specifically, subsection (h) would require PBXs to return answer supervision on all DID calls which complete at a station or an attendant; on all calls which contain announcements except for "number invalid," "not in service," or "not assigned;" and on all calls which require a dialing prompt, *i.e.*, a tone or message which instructs the caller to enter a code to further advance through the called party's telecommunications system. It also would require answer supervision for calls routed back to the PSN by PBXs which are answered either by live voice or a recorded announcement. Calls which are unanswered, or are routed to busy tones or reorder signals, *i.e.*, trunk busy signals, would not be required to return answer supervision. The proposed rule would require equipment manufactured one year after the effective date of the subsection to meet the new requirement. Earlier manufactured equipment would have to comply only if newly installed within eighteen months after the effective date of the new subsection. Such equipment would require reregistration if it is not compliant with the proposed subsection. Embedded CPE otherwise would not be subject to the proposed rule. Finally, the Commission requested that interested parties file cost and statistical data related to unbilled calls placed to embedded equipment.

5. In the *NPRM*, the Commission stated it chose not to rely on market forces and industry standards committees to resolve the equipment-generated billing problem, because a rule would be more effective than voluntary adherence to an industry standard. *NPRM* at 4579. Several parties express views on this preference.

6. Most commenters generally favor the proposal.[5] Therefore, except for clarifying language suggested by some of the commenters, we herein adopt the proposal presented in the *NPRM*. In the absence of the kind of detail requested for analyzing whether retroactive application of the subsection would be appropriate, we conclude that application should be prospective only. Though some commenters express doubt that PBXs can be equipped with circuitry capable of providing call progress status, *i.e.*, detecting whether a call routed back to the PSN is answered, our rule permits the use of any technique which permits compliance with the new rule. Finally, we take no action with respect to a new proposal to permit the use of announcements in lieu of busy tones.

COMMENTS AND DISCUSSION

1. Part 68 rules

7. *Comments*. Based on toll fraud investigations it conducted in 1983-84, AAI states that approximately three percent of the calls listed as unanswered in fact were

completed to PBXs that failed to return answer supervision, which represents two to three percent of all interexchange carriers' (IXCs) revenues. If expressed in terms of 1988 dollars, AAI says the annual revenue losses would range between $250 million to $378 million. AAI states that other call detecting procedures, *e.g.*, line status recognition devices, are either too expensive or inaccurate. According to SWB, the Commission's proposal places the burden of compliance on the proper parties, PBX manufacturers, and not PBX users. GTE says that it does not have any independent quantification of the billing problem, but concludes that PBXs' failure to signal answer supervision could result in losses totaling millions of dollars by telephone companies. It is most concerned about the scope of the problem as it relates to embedded equipment, suggesting application of a new requirement might not be justified for such equipment. On the other hand, SRX states that PBX manufacturers did not cause the problem, nor would they benefit from the proposed resolution. NATA says AT&T did not respond with the type of information and documentation necessary for the type of Commission action AT&T seeks. It also observes that AT&T was the lone IXC to file comments, suggesting the problem is not as widespread as claimed. Nevertheless, NATA states it would support a reasonable, nondiscriminatory, prospectively applied rule.

8. According to NATA, the concerns raised by the proposed rule require industry consensus. US West states that the Accredited Standard Committee T1 on Telecommunications has approved, and submitted to the American National Standards Institute (ANSI) for approval, a proposed standard for Loop Reverse- Battery Signaling, ANSI BSR T1.405.[6] In its view, ANSI BSR T1.405 addresses the issue encompassed by proposed Section 68.314(h) -- when answer supervision should occur -- and only differs from the Commission's proposed requirement in that, as an industry standard, it would be voluntary. Because of the schemes' similarities, US West urges the Commission to forego adoption of its proposed rule "for a year, during which time AT&T and other interested parties could monitor and report their experience back to the Commission." US West Comments at 5, n. 16. Alternatively, it requests that the Commission incorporate ANSI BSR T1.405 into Part 68 by reference. SRX backs US West's proposal. BellSouth opposes delaying rule implementation because it does not view industry standards as being enforceable or effective in alleviating toll fraud. *See also* Bell Atlantic Comments at 1-2. AT&T states that industry committees have acted and their action supports its proposal.[7]

9. In reply, AT&T suggests that other IXCs might not be participating in this proceeding because, prior to the availability of equal access, many IXCs employed procedures which only activated billing after a specified length of time after dialing. This technique does not rely on answer supervision, AT&T notes, and may result in billing for some unanswered calls. Some of these calls, it continues, are routed to announcements and other calls for which NATA claims there should be no charge.

10. *Discussion.* In the *NPRM*, the Commission stated that Part 68 sets forth the terms and conditions for connection of customer premises equipment and wiring to the telephone network. A primary objective of Part 68 is to assure consumers, manufacturers and carriers that customer premises equipment attached to the network causes no harm. Section 68.3 defines harm as

> Electrical hazards to telephone company personnel, damage to telephone company equipment, malfunction of telephone company billing equipment, and degradation of service to persons other than the user of the subject terminal equipment, his calling or called party.

Billing errors created by improperly installed or maintained CPE constitute network harm. *NPRM* at 4579.

11. No party questions the premise that some PBXs fail to provide the signal needed to activate telephone companies' billing mechanisms. Rather, the focus is on the magnitude of the problem. AT&T initiated this proceeding because it is losing revenues from such equipment. AAI is the first party to provide specific data relating to lost revenue, though the figures are not corroborated. There is general support, however, for prospective employment of the proposed rules. Malfunctioning billing equipment is a network harm, and a goal of the interconnection program is to ensure that telephone companies' networks are not adversely affected by private CPE attachment. We believe the issue is appropriately considered and resolved in a Part 68 Rule Making proceeding.

12. The *NPRM* stated that market forces in this instance provide little incentive for manufacturers or suppliers to develop mechanisms to eliminate the billing problem. *NPRM* at 4579. The record shows that some manufacturers continue to feature their equipment's ability to avoid certain toll charges. AAI Comments at 2. There is no evidence that the problem is abating. Nor do we believe that a proposed voluntary industry standard would adequately address the problem. By imposing a technical requirement as a condition of registration, the issue is addressed before the fact rather than through repeated complaint proceedings, which consume greater resources. Under the proposed rule, eventually the end user will only have available equipment that provides the required network signalling. The Commission must assure to the extent possible that no harm comes to the network by its interconnection policies. It is therefore Part 68 that, in the first instance, should serve as the vehicle for solving what has been identified as a current CPE-generated network harm. This does not preclude industry from developing additional or parallel performance standards for PBXs to prevent harm to the network, but such standards may not supersede or undermine the minimum network protection standards embodied in Part 68. We do not believe a reference in Part 68 to industry standards is necessary with adoption of the new rule herein.

2. Types of Calls

13. In the *NPRM*, we proposed specific conditions to indicate when answer supervision should be required, *i.e.*, when PBXs should send call completion signals to the telephone company.[8] *See* Sections 68.314(h)(1)(i)- (v). The following paragraphs summarize commenters' views on the two basic types of calls handled by PBXs that are at issue, *viz.*, DID calls terminating at the PBX and calls forwarded by the PBX through the network to another number.[9]

14. *Calls terminating at the PBX.* The proposal in the *NPRM* would require answer supervision on all DID calls terminating at announcements, except for recorded messages stating "number invalid," "not in service," or "not assigned." *See* subsections 68.314(h)(1)(iii) and (2)(i)(D). AT&T expresses disapproval of the exemptions provided

for in these subsections. It states that the proposed rule is intended to track customers' perception of similar messages received from telephone companies, but implicit in the Commission's proposal is an assumption that manufacturers can assure that future PBXs will contain unalterable messages which customers only can turn on or off with respect to a given line. AT&T explains that telephone companies do not bill for such calls because they have not rendered the service the customer requested. In the case of a DID call to a PBX, a telephone company completes its service when the call reaches the PBX and should be paid, AT&T argues.

15. NATA says it has no objections to proposed subsections 68.314(h)(1)(iii), (h)(1)(v) and (h)(2)(i)(D), but notes that it lacks adequate information as to whether other "free" announcements are provided via network-based services. NATA suggests that, rather than attempt to identify all such announcements, the Commission should amend proposed subsections 68.314(h)(1)(iii), (h)(1)(v) and (h)(2)(i)(D) to include the following language:

> or to an announcement that does not return answer supervision that is locally available as part of a network based system.

NATA Comments at 13, n. 11.

16. In TIA's view, callers are unable to distinguish between PBX announcements and local exchange carrier (LEC) announcements. Like AT&T, TIA suggests no exceptions should be given for calls completing at a PBX which provides announcements. On the other hand, NATA contends that telephone companies do not charge for calls routed to "number invalid," and "not assigned" announcements, but that AT&T would require PBXs to provide signalling for the same calls, *i.e.*, those which result in similar announcements. *See also* SRX Reply at 6. In its reply, GTE supports AT&T's position that exemptions are unwarranted, averring that imposing a signalling requirement on all announcements would lessen the incentive to use them, shift such traffic to attendants and increase call completions.

17. AT&T takes exception to NATA's request that answer supervision not be required on calls completing at PBXs' recorded announcements, when not required of similar network announcements. AT&T charges that NATA fails to distinguish between network announcements and customer-generated announcements, which impart messages. Network announcements inform callers that the telephone company cannot perform the service requested, whereas, in the PBX case, the telephone company completes its service when calls reach the called stations, *i.e.*, the PBX. As to calls forwarded to call prompts, AT&T maintains that those built into the network differ from PBX dialing prompt functions. In the first instance, the service is provided within the network and does not enable the "called party to communicate or receive messages, introduce advertising on the line,"[10] or avoid charges. Answer supervision, it explains, is returned when the call reaches the called party's premises, the point at which a PBX should also respond.

18. *Discussion.* No one opposed the proposal to require PBXs to return answer supervision on DID calls answered by the called party or by an attendant at the PBX. Thus, subsections 68.314(h)(1)(i) and (1)(ii) are adopted. With respect to Centel's recommendation that the rules be modified to include calls answered by modems and other kinds of data communications devices, we believe that the term "answered" in (i) encompasses analog telephones, modems, facsimile devices and any other Part 68 registered terminal equipment.[11] It is therefore unnecessary to augment the language of subsections (i) and (ii) with specific kinds of devices.

19. The proposal to exempt from answer supervision DID calls terminating at "number invalid," "not in service," or "not assigned" announcements generated by the PBX is not universally supported. AT&T, GTE and TIA believe a more logical approach would be to require answer supervision for DID calls reaching any announcement. AT&T believes it is difficult to design PBXs to exclude only these announcements. However, the record suggests that many PBXs already are capable of offering this exclusion. *See* Fujitsu Comments at 4, where Fujitsu states that "[b]ecause the AT&T proposed DID standard as *modified* in the Commission's proposed rule is generally consistent with current Fujitsu technology . . . Fujitsu supports the proposed rule." Other commenters, including equipment manufacturers and telephone companies, also found the proposal to be reasonable.[12] These answer supervision exceptions are a reflection of the expectations of callers. AT&T acknowledges that no charge is assessed for such calls made through the network, *i.e.*, through CENTREX service. Yet AT&T takes the position the same callers reaching an identical announcement at a PBX should expect to be charged.

20. Users are unlikely to discern between calls reaching announcements provided by telephone companies as against those supplied by PBX owners. Only limitations of technology warrant perpetuation of differing charges for identical services.[13] We recognize that the three specified messages in Section 68.314(h)(1)(iii) may not be the only voice messages for which telephone companies do not charge. But NATA's request for inclusion of language to allow exemptions for all DID calls "locally available as part of a network based system" would permit PBX users to augment the three specified messages at will. Such unfettered discretion would undermine the goal of the rule to prevent PBX-generated billing fraud. For their part, PBX manufacturers cannot be expected to follow each PBX they sell through the distribution chain and modify it to match the local telephone company's array of messages that do not invoke answer supervision. The record does not even suggest an array of alternative messages used by telephone companies. It is apparent, however, that the three messages specified in Section 68.314(h)(1)(iii) constitute the foundation of most, if not all, telephone companies' exempt voice messages. The intent here is to limit, to the extent reasonably possible, the specific responses from a PBX that do not require dispatch of answer supervision, and to require manufacturers to show equipment compliance through the Part 68 registration process.[14] Thus, manufacturers will be expected to design PBXs so that they will return answer supervision in a manner which cannot be readily altered by software control or other user controlled media. In conjunction with carefully drawn user instructions, the number of incidents of faulty answer supervision should be reduced through the use of equipment registered and used under the new rule. With their fraud detection techniques, carriers can locate remaining cases of abuse. As

technical or service offerings change, we will consider further rule modifications. We therefore adopt subsections 68.314(h)(1)(iii) and (h)(2)(i)(D).

21. *Forwarded Calls.* Under the proposed rule, PBXs would be required to return answer supervision on all calls transferred back to the PSN, *i.e* forwarded to a station not served by the PBX, except those that are unanswered, reach a busy line or invoke a "reorder"[15] signal. AT&T believes the proposal not to require billing for all forwarded calls unfairly burdens telephone companies and reflects a misconception of current technology. AT&T explains that when a PBX forwards an incoming call to a telephone not under the electronic control of the PBX, *i.e.*, a distant location, that telephone, in answering, will return answer supervision to its local serving telephone company, which forwards the answer supervision signal to the telephone company serving the forwarding PBX. The telephone company which serves the PBX, however, does not send answer supervision signals to the PBX. The technology which the Commission suggests exists that would allow the telephone company to provide the PBX with an appropriate signal is, according to AT&T, infeasible, expensive and generally not available, thereby making it an unattractive solution for either the telephone companies or PBX manufacturers.[16] Therefore, AT&T concludes, if the Commission wishes not to bill the originator of calls which are forwarded and unanswered, then telephone companies must forego billing on all PBX-forwarded calls. Alternatively, it argues, the originator should pay for the call to the PBX whether such calls are answered or not at the distant station.

22. Centel, on the other hand, disapproves of subsection 68.314(h)(1)(v), which mandates a return of a signal for calls forwarded back to the PSN and answered from the distant station by a "number invalid," "not assigned" recording, etc. In these cases, it believes callers have not received any substantive information, and therefore should not be billed.

23. According to GTE, the proposed rule does not resolve the problems associated with calls switched to the PSN or private networks by a PBX. In some cases, answer supervision would not be present, necessitating the introduction of a timing interval, an approach which it states caused callers dissatisfaction prior to IXC equal access. GTE concludes that its initial proposal is a better solution, *i.e.*, require forwarding PBXs to repeat a LEC-provided signal or transmit a default signal if one is not present.

24. TIA agrees with AT&T that answer supervision should be returned on all DID calls forwarded back to the PSN. It recommends that consideration be given to requiring timed return of answer supervision, *e.g.*, return of a signal 10 seconds after dialing ends, and repetition of the signal when provided by the LEC. The use of the timed option is not without precedent as many IXCs currently employ the technique, TIA states.

25. In its comments, NATA says that proposed subsection 68.314(h)(1)(v)[17] would require payment for a call forwarded by an intervening PBX to an announcement that the number is "not in service" or "not assigned." According to NATA, a similar call placed through the network, *i.e.*, CENTREX, would not result in a charge to the calling customer.

26. SRX claims that, if the proposed rule is adopted, PBX manufacturers would be forced to make expensive equipment modifications. Rather than taking this approach, SRX suggests that the Commission require LECs to provide all IXCs and others answer supervision through central office equipment, and AT&T to employ billing techniques similar to those used by its competitors. In this way, PBX users would not have to make equipment modifications because the answer supervision mechanism would be incorporated into all telephone networks.

27. In its reply comments, AT&T claims that NATA overlooks the different service packages and prices offered by CENTREX providers and PBX users. According to AT&T, CENTREX providers include the cost of answer supervision in rates for calls forwarded back to the network, a network service also available to PBX customers. If PBX customers obtained this capability, their PBXs could distinguish between answered and unanswered forwarded calls. AT&T, however, does not encourage Commission-mandated purchase of this feature as a solution to the problem because customers would then have control over when to return answer supervision.

28. GTE supports the return of answer supervision on all forwarded calls, whether forwarded to the PSN or private networks. To mitigate any customer confusion, GTE suggests that PBX manufacturers be required to incorporate a distinctive tone (or announcement) to indicate that a PBX has answered the call and is forwarding it to another station. BellSouth suggests SRX misunderstands the purpose of Part 68 to ensure that CPE directly connected to the network causes no harm, including malfunctioning of carriers' billing equipment. BellSouth says its support for proposed subsection 68.314(h)(1)(iii) is conditioned upon equipment designs that preclude users from controlling or altering recorded messages, other than to activate or deactivate them. Otherwise, it would support AT&T's proposal to require answer supervision on all forwarded calls.

29. *Discussion.* Some parties would have the Commission establish a standard requiring the forwarding PBX to send answer supervision signals to the local central office on all rerouted calls, whether answered or not; others favor requiring no answer supervision signal in response to any call that is switched back to the PSN. Still others request that the Commission require telephone companies to provide some kind of signalling to the PBX which would instruct it to return answer supervision to the central office serving the calling stations.

30. Considering the last proposal first, those advocating a rule requiring telephone companies to provide answer supervision to PBXs for calls forwarded through the network have offered no cost or feasibility data in support of their position. Specifically, there is insufficient information in the record with regard to the percentage of central offices equipped to provide this service or a survey of the tariff charge where the service exists.[18] In view of this lack of data, and because we believe the proposal we adopt today is a better way to address the problems this proceeding was intended to examine, we will not now require telephone companies to provide answer supervision service to PBX users for calls forwarded through the network.

31. The first proposal, requiring answer supervision to the central office serving the calling station for all calls forwarded through the network by a PBX, is unjustified. Users of telephone services do not expect to pay for unanswered calls, whether forwarded or not. Indeed, callers have no way of knowing whether a call has been

forwarded by a PBX to another location. Requiring the PBX to emit an audible tone to give notice to the caller of forwarding, for example, is unproven, alters an otherwise transparent switching process, and may lead to consumer confusion. The telephone equipment market has developed into an extremely competitive one, yielding many price and service benefits to consumers. CENTREX service, which uses the central office switch to perform the forwarding function of a PBX, does not bill for calls unanswered or busy (including calls that invoke a "reorder" signal), or calls that invoke a network-generated "unassigned", "number invalid", or "not in service" message. A bias favoring CENTREX could develop to the extent calls forwarded through a PBX to the network cause billing that would not occur if forwarding had been achieved through CENTREX service. As discussed herein, technology exists that permits some calls forwarded by PBXs through the network to be identified as nonbillable. Thus, requiring answer supervision for all calls forwarded by a PBX through the network would disserve the public interest where, as here, the record fails to demonstrate any significant benefits. We therefore reject this approach.

32. We also cannot find that a rule exempting all calls forwarded by a PBX through the network from billing would be fair. Under Title II of the Act and most state policies, carriers generally are entitled to charge for services rendered. *See, e.g.*, 47 U.S.C. § 201(a). Exempting all forwarded calls from charges simply because the call had been forwarded through a PBX would be unjustified. We therefore also reject this suggestion.

33. The proposal offered in the *NPRM* appears to be the best solution to balance fairly the interests of PBX users and manufacturers, carriers and callers. It requires answer supervision from the PBX to the central office for all calls completed after forwarding through the network, including those reaching any voice message. Busy, reorder, and unanswered calls would not require dispatch of answer supervision by the PBX. "Number invalid", "not in service", and "not assigned" messages, for which there would be no charge had the call been made station-to-station or via CENTREX service rather than through the PBX and back to the PSN, would require answer supervision because the PBX generally cannot distinguish between live voice and recorded voice from an answered call, or between voice signals emanating from a distant central office and other live or recorded voice signals. One object of the rule is to require answer supervision from a PBX in a way that as closely as possible duplicates CENTREX and network services, but technology does not yet appear to offer a way to achieve operational parity. Moreover, the record does not suggest that the magnitude of the potentially "unfair" charges resulting from this approach is substantial.[19]

34. The most troubling issue among commenters on the matter of PBX-forwarded calls is our expectation that PBXs can be equipped with circuitry capable of determining whether a forwarded call has been "answered".[20] Several commenting parties maintain that the cost of incorporating this type of circuitry in PBXs is prohibitive and unlikely to be beneficial. No mandatory method for determining whether a PBX-forwarded call has been answered was contained in our proposed rule. The proposed rule as drafted provides PBX manufacturers sufficient latitude to design any means to meet the objective of the rule. We know, for example, that there is an industry of customer owned, coin operated telephones that rely on a variety of means to sense an off-hook transition at the called end.[21] Some telephones rely on line noise templates; others simply use a time period criterion, essentially deciding that the call has been answered if the caller remains off-hook for, *e.g.*, 15 seconds.[22] Still others sense voice on the line to decide that call completion has occurred. All of these techniques rely on available technology, and there is no indication in the record that at least one such technique cannot be implemented with little additional cost to the PBX manufacturer. No commenting party dismissed as either technically infeasible or unreasonably expensive all means to achieve compliance with our proposed requirement. In view of the benefits to be derived, *viz.*, prevention of large revenue losses by carriers, we find that the proposed rule is reasonable and effective.[23]

3. Compliance

35. The *NPRM* proposed to defer registration requirements for new equipment for one year after the effective date of the new rule. Earlier manufactured equipment installed or relocated on customers' premises eighteen months, or later, after the rule's effective date would be required to comply with the new standard. No notification requirement for PBX users or manufacturers was proposed.

36. *Comments*. Because most PBXs are software controlled, AT&T would allow three months from adoption of our proposed rule for manufacturers and users to comply with the new requirement. AT&T says that it has discovered that many PBX owners/users do not understand that their PBXs are required to be programmed to return answer supervision. Manufacturers of such equipment, in its view, are obligated to provide users with this information, which it also claims is not an onerous burden. In short, AT&T feels that the proposed one year compliance date is unduly generous.

37. GTE supports the Commission's approach to handling offending embedded equipment, including the grandfathering provision. GTE Comments at 3. However, it notes, some manufacturers may no longer be in business, requiring special treatment for such equipment, which may require reregistration under the eighteen month rule for earlier manufactured equipment. UTC also supports the proposed rule, especially its prospective application. With the use of existing fraud detecting and regulatory processes, UTC concludes, the signalling problem of installed and in-the-field equipment will be eliminated. NATA contends that retroactive application of the proposed rule would introduce complex compliance problems and create unnecessary opportunities for discrimination, though it believes that a one year grandfather date and an eighteen month register-only date are inadequate because altering the manufacturing processes to incorporate answer supervision requires substantial lead time. *See* NATA Comments at 5 and Exhibits A and B. NATA adds that the effective date of the new rule will occur during the life cycle of some products, requiring a few manufacturers to abandon certain products or manufacture them until the grandfather date and then stop production. This, NATA suggests, may cause an increase in non-complying equipment in the field. NATA therefore recommends that the grandfathered and register-only dates be two and three years, respectively.[24] For its part, SRX recommends a transition period of at least three years.

38. Fujitsu asserts that the Commission's proposed compliance periods are the minimum that should be provided, if manufacturers are to have a reasonable period to change over their production. *See* Fujitsu Comments at 4-5. However, to accommodate unique cases, Fujitsu urges the Commission to declare a willingness to consider speedily any request for waiver.

39. AAI alleges that some PBX users deliberately fail to return answer supervision in order to avoid charges, and that some equipment manufacturers are featuring their equipment's ability to delay or suppress the required signal. To alleviate the problem, AAI recommends that rules be adopted requiring immediate correction of offending equipment, with LECs permitted to discontinue service where necessary. In addition, AAI asks that manufacturers of embedded equipment be required to provide interested parties details of their equipment's ability to be programmed to delay or suppress answer supervision, thereby providing carriers with a list of equipment which could be misused. It further suggests that installers be required to provide a "certificate of compliance" to equipment users and carriers at the time of installation or repair, and that the Commission require subject LECs to annually report on their efforts to identify and notify users of offending equipment. Pacific recommends that the Commission require equipment manufacturers to modify any software upgrade for existing equipment to provide answer supervision. As users purchase the new software, they concurrently would be modifying the equipment to comply with Part 68. Pacific feels this approach imposes no more costs on manufacturers and users than the Commission's proposed requirement for new equipment, and it would produce earlier compliance with Part 68.

40. Centel recommends that some compliance responsibilities be placed on end users. The language it submits to achieve that goal is intended to provide carriers an additional legal basis under which they may collect charges in cases where equipment has been altered. It specifically recommends that the last sentence of subsection 68.314(h)(4) be revised to read:

> Compliance with the subsection shall require that equipment be designed *and manufactured* so that it will return answer supervision in conformity with this rule in a manner which *will make alteration* by software control or other user controlled medium *extremely difficult, if not impossible. Any PBX equipment which has been reprogrammed or modified so that the return answer supervision signalling capabilities of such equipment does not comply with this section, shall be considered illegal for purposes of registration under the Commission's Part 68 rules.* [Underline denotes recommended language changes.]

Centel Comments at 5.[25]

41. To combat the problem of reprogramming existing PBXs to not return answer supervision, GTE, in its reply, recommends that the Commission institute a program, applicable to existing PBXs, requiring manufacturers to notify the Commission of their equipment's ability to return answer supervision for calls to attendants, DID stations and prompts; for calls to announcements and for those calls that are forwarded. GTE Reply, pp. 5-6. GTE believes its notification plan will provide telephone companies with the information they need to enforce their tariffs and will excuse PBX manufacturers and vendors from the obligation of notifying customers or providing a customer list, as proposed by AT&T. Although it supports the Commission's timetable for compliance with the proposed rules, GTE implies that should the Commission fail to drop its circuit-status-equipment proposal and rely on the T1E1 standards, more time would be required.

42. Finally, SRX takes exception to Pacific's proposal to require PBX manufacturers to improve software for embedded equipment. SRX believes the proposal ignores technical difficulties, and argues that such changes are not "quick-fix software patches," but, rather, changes which require planning, development, testing and then production. SRX also opposes AAI's idea that the required equipment modification be completed within weeks.

43. *Discussion.* In its *NPRM*, the Commission rejected proposals seeking to apply the proposed rule to embedded CPE. It explained that proponents of retroactive applicability had not supported their positions with analyses regarding the impact on carriers, equipment manufacturers and suppliers, or data concerning the amount of embedded equipment involved or costs of implementation. *NPRM* at 4581. The Commission indicated that the number of devices already installed makes implementation of retroactive proposals impractical. A few commenters continue to advocate applying the proposed rule to embedded equipment but, despite Commission requests, no cost and statistical data support have been supplied. Absent these data, and in view of the burden on industry commenters such an approach likely would impose, we will not alter our proposal and include all embedded equipment.[26] We therefore reject AAI's and Pacific's proposals.

44. Under GTE's proposal, manufacturers would be required to notify the Commission of their equipment's ability to provide answer supervision in all situations. Equipment subject to this requirement would include old non-registered (grandfathered) equipment, manufactured discontinued equipment and previously registered devices. We cannot reasonably anticipate that locating all PBX manufacturers and their extant PBXs is a task likely to be accomplished either accurately or completely. There are currently 87 registrants of PBXs, some dating back to 1976, but it is not known how many remain in business or whether they, including successors to other entities, have the kind of information GTE would seek. Moreover, while many older PBXs will continue to be used, there is a natural technological obsolescence and a life expectancy for PBXs that leads ultimately to their replacement. The accounting rules used by the Commission, for example, suggest a useful life of about 9 years for PBXs.[27] The balance, then, between burdening industry and the Commission with a questionably effective reporting requirement to maximize applicability of the PBX answer supervision rule against reliance on a more readily implemented and enforceable mechanism that applies only to prospective connection and registration seems to favor the latter. We therefore reject GTE' suggestion, but reiterate that telephone companies are encouraged to rely on their own fraud detection techniques to detect PBXs not properly returning answering supervision.

45. Both Centel and TIA recommend that the Commission place some responsibility for rule compliance on end users. Centel suggests that Section 68.314 contain language to make it illegal to alter a PBX so that it does not comply with the proposed answer supervision requirement. TIA, on the other hand, advocates a rule requiring

notification to end users that equipment alterations affecting compliance in this area are the users' responsibility. Part 68 currently makes it a violation of the Commission's rules to operate terminal equipment in a manner inconsistent with that part of the rules. *See* Section 68.108, which permits a carrier to discontinue a customer's telephone service if the customer's CPE harms the carrier's network.[28] We have already declared that failure to return required answer supervision signal constitutes harm to the network. *See* para. 11, *supra*. In addition, users may be prosecuted pursuant to Title 18, Section 1343, Fraud by Wire, Radio, or Television, 18 U.S.C. § 1343, for willfully acting to avoid charges prescribed by carriers' tariffs.[29] Further, registration will require that PBXs be designed, manufactured and installed so that they will return answer supervision in a manner which cannot be readily altered by software control or other user controlled media. With these kinds of safeguards in place, a rule incorporating the suggestions of Centel and TIA appears unnecessary.

46. The majority of the commenters favor the proposed one year/eighteen months implementation periods contained in the NPRM. AAI and AT&T, however, urge a much shorter period, and NATA and SRX claim a longer period is required. In drawing a balance between the need to invoke measures to correct improper billing and the burden on users and manufacturers to apply new technical standards, we believe that our proposal of a grandfather period of one year and an eighteen month register-only date represents a reasonable compromise. These periods will allow manufacturers sufficient time to adjust their production processes and reduce their inventory of recently produced equipment.[30]

4. New Services

47. With today's technology, NATA asserts it is possible to replace some network signals with recorded messages. For example, technology now permits the use of the message, "Your party is busy. You may dial another extension now or wait for the operator," in lieu of the standard busy tone. Under the proposed rules, NATA argues, the use of this message would invoke a charge for the call if the calling party decided to terminate the call without waiting for the operator, whereas the use of the busy tone would not. In its view, using messages to signal that the called party is busy represents a more efficient and economical use of the network than hanging-up and calling later.[31] In addition, it notes, such technology is being deployed in CPE and the network today. NATA Comments at 18, citing *Bell Atlantic Telephone Companies, Petition for Waiver of CEI requirements to Perform Technical Trials of Coin Messaging Service*, DA 88-1467 (September 29, 1988).[32] NATA believes it is not the Commission's intent to permit discrimination against such CPE- based offerings.[33] In its view, "[t]he only rationale for discriminatorily denying the public these benefits is the alleged potential for fraud and abuse." NATA Comments at 20. AT&T says there is no technology currently available permitting a PBX or central office to differentiate between a live or recorded message. Therefore, it does not support NATA's request that use of recorded announcements be permitted in lieu of busy tones. AT&T Reply at 15-16.

48. *Discussion*. The purpose of this proceeding has been to determine under what conditions it is necessary for PBXs and similar equipment to provide answer supervision to the network, in order to protect the network from harm. In the case of a PBX-forwarded call that is answered by CPE that states, "Your party is busy . . .," we noted above that current technology does not appear to permit the PBX to determine whether the call has been completed and is properly chargeable or whether the message is the equivalent of a busy signal or other message provided by the serving telephone company that does not invoke answer supervision. Absent readily available technology, we cannot find that NATA's approach is practicable. As to PBX-terminated calls, we again observe that, in an effort to establish parity with locally provided telephone company services and to limit the kinds of messages that PBXs may transmit without providing answer supervision, only the messages specified in our rule may be used without accompanying answer supervision. *See* discussion, *supra* at para. 33. Accordingly, we will defer consideration of NATA's proposal until it can be shown that voice recognition technology capable of identifying live audio, or other, network intercept-equivalent voice messages is viable and reasonably economical.

CONCLUSION AND ORDERING CLAUSES

49. The record shows that some CPE is causing telephone companies' billing equipment to malfunction, permitting callers to avoid lawful charges for completed calls. The rule proposed in the *NPRM* provides a balanced solution for equipment that will be connected to the network in the future. The record developed in this proceeding remains inadequate to require retrofitting of equipment already connected. Therefore, the new rule we adopt herein only addresses the billing fraud issue prospectively and relies on carriers' toll fraud detection efforts and normal PBX retirement and replacement to resolve the problem involving installed and in-the-pipeline equipment. Although this approach will not remove offending equipment from the market immediately, over time the market should be free of non-complying equipment. Moreover, we view this approach as providing the best balance between the interests of equipment manufacturers and carriers. Our analysis indicates that the new rule will cause the least disruption in the marketplace and impose minimal costs on equipment manufacturers, suppliers and users, and on carriers, while affording equitable treatment to ratepayers.

FINAL REGULATORY FLEXIBILITY ANALYSIS

50. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis with regard to the Report and Order is as follows:

I. Need and purpose of this action:

The regulations adopted by this Report and Order are required to protect the public switched telephone network from harm which, as defined in 47 C.F.R. Section 68.3, includes malfunction of telephone company billing equipment, *e.g.*, that caused by failure of PBXs to return answer supervision signals. The regulations will require PBXs to provide such signals under a variety of circumstances, preventing billing losses to carriers.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were filed in response to the initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The Commission considered the alternatives raised by the parties in this proceeding and considered all the timely filed comments directed to those issues. After carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course of action under the Communications Act of 1934, as amended.

PAPERWORK REDUCTION ACT STATEMENT

51. The new rule contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to not impose a new or modified information collection requirement on the public.

ORDERING CLAUSES

52. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-05, 215, 218, 303(r), 313 and 412 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-05, 215, 218, 303(r), 313, and 412, that Part 68 of the Commission's Rules and Regulations, 47 C.F.R. Part 68, is amended as set forth in Appendix I below.

53. IT IS FURTHER ORDERED, that the Secretary shall cause a summary of this order to be printed in the Federal Register and shall send a copy of the order to the Counsel for Advocacy of the Small Business Administration in accordance with Section 604 of the Regulatory Flexibility Act (5 U.S.C. § 601 *et. seq*, 1980).

54. IT IS FURTHER ORDERED, that the rule amendment adopted herein shall become effective sixty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX I

Part 68 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 68) is amended as follows:

1. The authority citation for Part 68 continues to read as follows:

Authority: Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082; (47 U.S.C. 154, 155, 303).

2. Section 68.314 is amended to add paragraph (h) to read as follows:

§ 68.314 Billing Protection

* * * * *

(h) Operating Requirements for Direct-Inward-Dialing ("DID"). (1) Answer supervision for DID calls to stations connected to the telephone company network through a Private Branch Exchange or similar system ("PBX") shall be returned to the central office on all calls which are:

(i) Answered by the called DID station,

(ii) Answered by an attendant,

(iii) Routed to an announcement, except for "number invalid," "not in service," or "not assigned" recordings,

(iv) Routed to a dialing prompt, or

(v) Routed back to the public switched network by the PBX, including calls routed to "number invalid," "not in service," or "not assigned" recordings.

(2) DID calls which do not require the PBX to return answer supervision are those: (i) which are not routed back to the public switched network and, in addition, are:

(A) Unanswered, *i.e.*, the called DID station receives a ring or other alerting signal, but does not answer, or the DID station to which the call is forwarded receives a ring or other alerting signal, but does not answer,

(B) Routed to a busy signal,

(C) Routed to a reorder signal, or

(D) Routed to a recorded announcement stating "number invalid," "not in service," or "not assigned"; and those

(ii) which are routed back to the public switched network and, in addition, are:

(A) Unanswered, *i.e.*, the called station receives a ring or other alerting signal, but does not answer, or the DID station to which the call is forwarded receives a ring or other alerting signal, but does not answer,

(B) Routed to a busy signal, or

(C) Routed to a reorder signal.

(3) Answer supervision on DID calls shall be provided in accordance with industry engineering standards.

(4) PBX and similar systems manufactured one year from the effective date of subsection (h) shall comply with the subsection. PBX and similar systems of earlier manufacture shall comply with the subsection if newly installed or relocated on a customer's premises eighteen months from the effective date of the subsection or any time thereafter. Such equipment must be reregistered by the manufacturer or other person responsible for equipment compliance with Part 68, if already registered but not compliant with subsection (h). Compliance with the subsection shall require that the equipment be designed, manufactured and installed so that it will return answer supervision in conformity with this rule in a manner which cannot be readily altered by software control or other user controlled media.

(5) As used in this Section 68.314(h), "Private Branch Exchange or similar system ("PBX")" means customer premises equipment, such as private branch exchanges, key equipment, multifunction systems, multiplexers, and any equipment for which adopted industry standard signalling is the standard mode of returning answer supervision.

APPENDIX II

Comments were filed by the following parties:

1. American Telephone and Telegraph company (AT&T)
2. Ameritech Operating Companies (Ameritech)
3. Athena Associations, Inc. (AAI)
4. Bell Atlantic Telephone Companies (Bell Atlantic)
5. BellSouth Corporation
6. Central Telephone Company (Centel)
7. Fujitsu Business Communications Systems (Fujitsu)
8. GTE Service Corporation and its affiliated domestic telephone, equipment and services companies (GTE)
9. North American Telecommunications Association (NATA)
10. Pacific Bell and Nevada Bell (collectively Pacific)
11. Shared Resource Exchange, Inc. (SRX)
12. Southwestern Bell Corporation (SWB)
13. The Mountain States Telephone Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (collectively US West)
14. The Utilities Telecommunications Council (UTC)
15. User Premises Equipment Division of the Telecommunications Industry Association (TIA)

Reply comments were filed by:

1. American Telephone and Telegraph Company
2. BellSouth Corporation
3. GTE Service Corporation and its affiliated domestic telephone, equipment and services companies
4. National Telephone Cooperative Association
5. North American Telecommunications Association
6. Shared Resource Exchange, Inc.
7. Southwestern Bell Corporation
8. United States Telephone Association

FOOTNOTES

[1] Petition for Adoption of a New Section 68.314(h) of the Commission's Rules (NPRM), 4 FCC Rcd 4577 (1989).

[2] Answer supervision is the term telephone companies use to describe the signal which the called station (or other customer premises equipment (CPE)) emits to tell telephone companies' billing equipment that a call has been answered and billing should commence. AT&T Petition for Rule Making at 3.

[3] The term PBX, as used herein, includes all CPE, *i.e.*, key systems, multifunction systems, multiplexers, etc., which employ "reverse battery" for returning answer supervision. Reverse battery is a "method of loop signalling in which the direction of current in the loop is changed to convey on-hook and off-hook signals." IEEE Standard Dictionary of Electrical and Electronics Terms, Third Edition at 786.

[4] This term refers to a feature of a PBX which allows incoming calls to reach telephones connected to the PBX without the aid of an attendant, *e.g.*, an operator.

[5] *See* Appendix II for the list of commenters.

[6] According to US West, AT&T was one of the members supporting this standard.

[7] AT&T cites ANSI T1E1.1/88-034R2, proposed draft ANSI BSR T1.405-1988, Section 5.5.2(4).

[8] We here adopt rule clarification suggestions offered by SRX, SWB, UTC, Ameritech, AT&T, Bell Atlantic and BellSouth regarding definitions of (1) answered and unanswered forwarded calls; (2) unanswered calls; (3) calls to private PBX networks; (4) the term "PBX-like equipment;" (5) the meaning of "newly installed equipment; and (6) "grandfathering." Each of these suggestions is minor in substance but will help reduce possible misinterpretation of the rule. In addition, we replace the word "and" at the end of subsections 68.314(h)(1)(iv) and 68.314(h)(2)(i)(C) with the word "or" as requested by Ameritech. This change will make clear that only one of the conditions under new Section (h) must be met to invoke the new requirement.

[9] Calls forwarded through the network are calls that are received by the PBX and rerouted to another telephone number at a distant location. Sometimes referred to as call forwarding, this capability is generally software controlled by the PBX user and, except for possible additional time needed for redialing, is essentially transparent to the caller.

[10] AT&T Reply at 13.

[11] In its comments, Centel calls for an answer supervision requirement for calls answered by modems or other forms of data communications devices. To accommodate such a requirement, it believes a separate category could be drafted, or it could be defined in subsection (i) of Section 68.314(h)(1). We note that the "voice" signals referred to in our discussion and in the rule we adopt herein include all analog signals normally conveyed in the local loop 3 kHz channel, *viz.*, actual voice and FSK (frequency shift keying) signals used for facsimile and modem transmissions.

[12] *See* UTC Comments at 3-4; Centel Comments at 3-4; NATA Comments at 12-13; and Bell Atlantic Comments at p. 1.

[13] It is suggested by several telephone companies that the inadvertent or intentional programming of a PBX not to send answer supervision to the telephone company for these special messages is the heart of this proceeding and warrants universal answer supervision for all calls received at a PBX. It is our belief that only technological differences justify disparate billing for the same call, made alternately to a PBX or through a telephone company switch. To the extent PBXs can be manufactured or designed to minimize such disparate treatment, we reject the need for universal answer supervision from PBXs.

[14] We do not intend to limit the method manufacturers may rely upon to reasonably assure that users will not be able to tamper with the list of exempt messages provided with the PBX. For example, use of solder mounted, voice-ROM (read only memory) integrated circuits would be acceptable, in conjunction with appropriate software and clear user instructions. In order to permit PBX users to match the array of exempt messages of their PBXs with those provided by the local telephone company, we will consider issuing waivers and interpretation letters to users or manufacturers upon a reasonable showing. In all cases, however, only the manufacturer or its agent will be authorized to make the necessary modification.

[15] A reorder signal informs the caller that the call cannot be completed by sending the caller a rapid busy signal. This is also known as a "trunk busy."

[16] *See also* GTE Comments at 7-8.

[17] *See also* NATA Comments at 8 and 9.

[18] We note, however, that some telephone companies offer answer supervision with line side interface, a service that provides answer supervision on the talk loop between the central office and the PBX. Ameritech, Bell Atlantic, BellSouth, Pacific

and US West operating companies reportedly are prepared to offer it as a basic service element on a case-by-case basis, priced in part as a function of the additional circuit interface card required at the central office.

[19] Charges for the call-forwarded component could be avoided entirely were PBX users to route their calls to a PBX attendant, avoiding the PBX forwarding.

[20] The Commission noted in the NPRM that:

> Current technology, as reflected in a variety of off-the-shelf customer-provided coin telephones and modems, permits electronic recognition of network line status. Thus, unanswered ringing, busy or off hook status is readily identifiable with reasonable accuracy, permitting the call forwarding PBX to dispatch the appropriate answer supervision toward the calling station.

NPRM at 4582. It is our understanding that signals can be detected, but absent simultaneous off-hook status information their source cannot be determined, *i.e.*, it cannot be ascertained whether they emanate from a network central office or come from a customer's answering machine. Current technology appears capable of determining whether a distant telephone has gone off-hook and whether there is voice (or analog data) on the line, but not necessarily whether the message is a "number invalid", "not in service", or "not assigned" announcement. The Commission favors application of technology that permits reliable duplication of network answer supervision functionality, and encourages implementation of such technology through further proceedings.

[21] *NPRM* at 4582.

[22] Several major IXCs relied on this billing criterion prior to equal access.

[23] We expect any PBX registration application filed under our new rule to demonstrate the method intended to be used by the PBX to sense voice for calls forwarded to the network, and the techniques and user instructions relied upon to assure that incoming DID calls are billed as required by the rule. Any technology which can be shown to provide reliable information regarding line status may be included in a request for waiver of subsection (h)(1)(v) of the rule. Also, as discussed above, the general availability of answer supervision with a line side interface from local telephone companies may remove the need for some components of the rule we are adopting.

[24] NATA argues that additional time is needed between the two dates because "as the period during which the redesigned product is coming on line extends, more of the product is in the pipeline in order to stay up with demand and avoid product shortages . . . ." NATA Comments at 6, n. 7.

[25] *See also* TIA Comments at 5-6; GTE Reply at 12-14 and SRX Reply at 7.

[26] Nevertheless, we encourage manufacturers to consider installing modifications to PBXs when they are on site for maintenance or other reasons, provided such modifications are not unreasonably expensive or technically impractical to implement.

[27] *See* Part 32 of the rules. Nine years represents an approximate average of the expected lives of digital, analog and older, electromechanical PBXs. Some newer PBXs may have shorter life expectancies. We also note that in CC Docket No. 84-885, 50 Fed. Reg. 47543 (January 19, 1985), the Commission eliminated the requirement for consumers to notify telephone companies of devices connected to their telephone lines.

[28] The definition of "harm" is contained in 47 C.F.R. § 68.3.

[29] This section generally applies to interstate calls. There are similar provisions in state law for intrastate calls.

[30] *Cf.* Subsections 68.2(b) and (e), 47 C.F.R. § 68.2(b) and (e), which established grandfather and register-only dates for other devices. No party in this proceeding has offered any numerical data in support of longer periods. Any party offering adequate justification may seek a waiver pursuant to Section 1.3 of the rules, 47 C.F.R. § 1.3.

[31] NATA Comments at 15 *et seq.*

[32] Coin Messaging Service is described by NATA as follows

> . . . . a caller at a Bell Atlantic pay telephone can use CMS [Coin Message Service] if the called telephone is busy or is not answered after a set number of rings. CMS equipment located in the network or at a coin telephone would then play a recording asking whether the caller wishes to leave a message. If the customer does not wish to leave a message, he or she may hang up, and there is no charge.

[Emphasis omitted.] NATA Comments at 18.

[33] NATA Comments at 19, citing *Carterphone*, 13 FCC 2d 420, 421 (1968); *First Report and Order, Interstate and Foreign Message Toll Telephone Service, MTS and Wide Area Telephone Service (WATS)*, 56 FCC 2d 593 (1975); *Second Report and Order, Interstate and Foreign Message Toll Telephone Service*, 58 FCC 2d 736 (1976); and *Computer II (Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry))*, 77 FCC 2d 384 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-480

In the Matter of

Amendment of Parts 13 and 80 of the Commission's Rules to implement the Global Maritime Distress and Safety System (GMDSS) to improve the safety of life at sea.

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1990; Released: October 25, 1990

By the Commission:

I. INTRODUCTION

1. By this action, we propose to implement the Global Maritime Distress and Safety System (GMDSS) in the Commission's Rules. This new system will change international distress communications from Morse code and manual operation to automated, or semi-automated, communications using satellite and digital technologies. By incorporating advanced communications techniques and using ship-to-shore communications links, the GMDSS will significantly improve the safety of life and property at sea throughout the world. These changes will affect ship and coast station equipment and operations worldwide and will be phased in from 1992 to 1999.

2. This proceeding proposes to incorporate the Final Acts of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on the Global Maritime Distress and Safety System, London, 1988, (1988 IMO Conference) into the Commission's Rules. It also completes the series of proceedings implementing the Final Acts of the 1987 World Administrative Radio Conference (WARC) for Mobile Services, Geneva, 1987 (1987 Mobile WARC).[1]

II. BACKGROUND

3. Over ten years ago, the International Maritime Organization (IMO), an agency of the United Nations, began work toward revising the 1974 Convention for the Safety of Life at Sea (SOLAS) to improve maritime safety. The new system was named the Global Maritime Distress and Safety System, or GMDSS. In concert with the requirements formulated by the IMO, another agency of the United Nations, the International Telecommunication Union (ITU), began work to revise the international Radio Regulations to accommodate the new radio requirements of the GMDSS.

4. The 1987 Mobile WARC adopted changes, effective July 1, 1991, to incorporate the radio provisions of the GMDSS into the international Radio Regulations.[2] In the fall of 1988, the IMO formally amended the 1974 SOLAS Convention to adopt the GMDSS. These amendments enter into force on February 1, 1992. The amendments to both the international Radio Regulations and the SOLAS Convention regarding implementation of the GMDSS were consistent with U.S. objectives, except for the revisions of Articles 55 and 56 of the Radio Regulations adopted by the 1987 Mobile WARC. [3]

5. Ships subject to the SOLAS Convention are required to carry certain radio equipment for safety purposes and are termed "compulsory" ships. Other ships, fitted with the same equipment, are termed "voluntary" ships. Under the SOLAS Convention, compulsory ships include all passenger ships that carry more than twelve passengers and all cargo ships of 300 gross tons and over engaged on international voyages. Similarly, Title III, Part II of the Communications Act of 1934, as amended, (Title III, Part II of the Act) specifies that it is unlawful for these ships to navigate in the open sea unless equipped with manual Morse code radiotelegraphy equipment. This proceeding addresses only those ships that are subject to either the SOLAS Convention or Title III, Part II of the Act (*i.e.*, compulsory ships which includes all passenger ships that carry more than 12 passengers irrespective of size and cargo ships of 300 gross tons and over).

III. THE PRESENT DISTRESS AND SAFETY SYSTEM

6. In order to appreciate fully the improvements that the GMDSS represents for the safety of life at sea, a short description of the present distress and safety system follows. The present system is based on certain classes of compulsory ships maintaining a continuous radio watch on three basic frequencies identified internationally for distress communications. On receiving a distress signal, the ship proceeds to the assistance of the ship, aircraft, or survival craft in distress. The present system is based on two major manually operated systems: (1) a Morse radiotelegraphy system on 500 kHz for all passenger ships and all cargo ships 1600 gross tons and over; and (2) a radiotelephony system on 2182 kHz and 156.8 MHz (Channel 16) for all passenger ships and all cargo ships of 300 gross tons and over. For the purposes of our discussion, certain fundamentals about the present system are summarized here:

(a) it is primarily a ship-to-ship distress system;

(b) ship size determines what radio equipment is required;

(c) the nominal range of communications for the shipboard equipment is approximately 150 miles;

(d) the quality of the communications is dependent upon propagation conditions;

(e) a continuous watch on the distress frequencies is necessary; and

(f) a Morse code qualified radiotelegraph operator is essential to operate the radiotelegraphy installations.

Thus, present distress and safety is primarily based on a manually operated, ship-to-ship system whose effectiveness depends on the location of the nearest vessel and with communications quality that varies based upon propagation conditions.

7. Over the years, few improvements have been made in distress communications based on traditional, terrestrial radio techniques. The advent of satellite and automated terrestrial communications systems, however, offers important advantages for distress and safety communications. By using these improved systems, a ship can send a distress alert over long distances with assurance that it will be received on shore. The GMDSS essentially replaces the existing manual Morse code ship-to-ship radiotelegraphy system with a fully automatic ship-to-shore distress alerting system using advanced satellite and terrestrial data communication systems.

IV. THE GMDSS SYSTEM

8. The basic concept of the GMDSS is that search and rescue authorities ashore, as well as shipping in the immediate vicinity of the ship in distress, can be rapidly alerted to a distress incident so they can assist in coordinated search and rescue operations with minimum delay. The GMDSS system is significantly more reliable for bringing assistance to vessels in distress than the existing system. For the purposes of our discussion certain fundamentals about the future system are summarized here:

(a) it is primarily a ship-to-shore system;

(b) the area of a ship's operation determines the equipment required;

(c) the range of communications extends worldwide;

(d) the quality of communications is greatly improved through the use of satellites and digital data transmissions;

(e) an automatic watch is provided on distress frequencies; and

(f) a qualified Morse code radiotelegraph operator is not required.

9. The GMDSS provides that the search and rescue operation be coordinated from shore by a Rescue Coordination Center. In accordance with arrangements made under the IMO by the International Convention on Maritime Search and Rescue (SAR Convention) adopted in 1979, Rescue Coordination Centers will provide the communication network to establish a coordinated search and rescue operation. The SAR Convention established an agreed international procedure for conducting search and rescue operations. The rescue will be coordinated by a SAR organization, or through the cooperation of neighboring SAR organizations. The Rescue Coordination Center will usually be connected through public switched networks or dedicated circuits with other Rescue Coordination Centers via coast stations or coast earth stations. In the United States, the U.S. Coast Guard is the designated maritime SAR organization and will operate the necessary Rescue Coordination Centers.

10. The GMDSS is based on providing a distress signal to shore facilities. The specific type of equipment used to perform this function varies and is determined by the area in which the ship operates. The areas have been defined as:

Sea area A1. An area within the radiotelephone coverage of at least one VHF coast station in which continuous digital selective calling (DSC) alerting is available. (This would extend 20-30 miles from shore.)

Sea area A2. An area, excluding sea area A1, within the radiotelephone coverage of at least one MF coast station in which continuous DSC alerting is available. (This would extend 75-150 miles from shore.)

Sea area A3. An area, excluding sea areas A1 and A2, within the coverage of an International Maritime Satellite Organization's (INMARSAT) maritime mobile geostationary satellite in which continuous alerting is available. (This would cover an area between 70oN Latitude and 70oS Latitude, which is within the footprint of the INMARSAT system.)

Sea area A4. An area outside sea areas A1, A2, and A3. (This would be essentially the polar regions.)

Sea areas are defined by individual countries and notified to the IMO. A sea area is established by equipping shore-based facilities with appropriate VHF, MF, HF, or satellite equipment to "cover" particular segments of ocean. The IMO is in the process of developing a *Master Plan of Shore-based Facilities for the GMDSS* that will delineate the geographic extent of the various sea areas worldwide. It is expected that additional sea areas will be incorporated into the GMDSS Master Plan as various shore-based stations are upgraded.[4]

11. The GMDSS consists of several communication systems, some of which are new, but many of which have been in operation for several years. Although satellites will be an important part of the GMDSS, new automated terrestrial data systems, as well as existing systems, will be combined into one overall system. A short description of the individual systems follows.

12. Satellite distress alerting is possible using the 406 MHz emergency position-indicating radiobeacon (EPIRB) of the COSPAS-SARSAT system.[5] The COSPAS-SARSAT provides a system of polar orbiting satellites which receive and relay distress alerts of EPIRBs and determines their position locations. There may be a delay in receiving the distress message unless the footprint of the satellite is simultaneously in view of a local user terminal and the EPIRB.[6] In the case where only the EPIRB is in view of the satellite, the distress signals are recorded on the satellite and transmitted to a local user terminal as it comes under the satellite footprint. When the local user terminal and the EPIRB are simultaneously in view of the satellite, however, distress alerts will be processed and immediately sent to the local user terminal. Although there may be a delay, worldwide alerting is possible through the use of 406 MHz EPIRBs. Since the COSPAS-SARSAT system began operation in 1982, more than 1,500 lives have been saved.

13. Satellite communications will be conducted through the use of the INMARSAT maritime mobile satellite system. INMARSAT has been in operation since 1982 and will form a major component of the GMDSS. INMARSAT provides a satellite communications system which makes available to ships a full range of distress alerting and communications capabilities, including voice, telex, and facsimile. The INMARSAT system operates in the 1.5/1.6 GHz bands (L-band) and uses geostationary

satellites, which cover the earth from approximately 70o North latitude to 70o South latitude. With a geostationary satellite system, communication is not possible in the polar regions. Ships equipped with a ship earth station or a L-band EPIRB would be able to send a priority coded distress alert. The signal is automatically given priority access to the system and enables contact with a coast earth station via one of the INMARSAT satellites. In addition to distress alerting, the system also provides for general two-way communication using narrow-band direct-printing radiotelegraphy or radiotelephony.

14. To send a distress alert from ships equipped with an INMARSAT ship earth station or a satellite EPIRB (either L-band or 406 MHz) will be simple. In the case of a ship earth station, it only involves pressing a special distress button or using a certain abbreviated dialing code. The L-band and 406 MHz EPIRBs will be capable of being activated manually or automatically upon floating free of the ship. The ship's name and position can be determined from the EPIRB signal. The coast earth station or local user terminal will immediately inform the associated Rescue Coordination Center relating the full particulars of the distress alert.

15. In areas covered by INMARSAT, the high frequency (HF) band will provide an alternative to satellite communications. Outside INMARSAT coverage, HF will provide the only long range communication capability. The medium frequencies (MF) in the 2 megahertz band will continue to provide a medium range service used for ship-to-shore, ship-to-ship, and shore-to-ship automatic alerting and communications. Finally, short range services, including SAR coordinating functions and on-scene communications, will continue to be carried out in the very high frequency (VHF) band.

16. The form of terrestrial communications, however, will change. No longer will Morse code be used for distress alerting or traffic. Instead, automatic distress alerting will be conducted using DSC. Distress, urgency, and safety calling will be carried out by DSC on HF, MF, and VHF radio frequencies. DSC will speed distress and general radiotelephone calls to and from shore and other ships. DSC distress messages would include automatically such information as the identity of the caller, the nature of the distress, and the time and position of the ship in distress. For quick activation in times of distress, a standard distress message can be pre-set and the time and position can be included automatically from position-fixing equipment and a navigation interface. After the initial DSC distress alert and acknowledgement, subsequent distress and safety communications will be by narrow-band direct-printing or radiotelephony using existing terrestrial systems.

17. To lessen the chances of an incident occurring due to dangers to navigation, the GMDSS also provides for a worldwide network for the dissemination of maritime safety information. A global network for the promulgation of safety information is envisioned through the use of three systems: the NAVTEX system, the group calling feature of INMARSAT, and the terrestrial HF services. The international NAVTEX system is an automated system that distributes maritime navigational warnings, weather forecasts and warnings, search and rescue notices, and other safety and urgent information to mariners. NAVTEX is simple to use. Ships receive printed messages in English on inexpensive, compact radio receivers. Messages are automatically printed, so there is no need for a person to be present to receive vital information. A small, low-cost, "smart" printing radio receiver has the ability to select messages depending on pre-set codes and to eliminate duplicative messages. To ensure that ships always receive important information, however, certain safety messages cannot be rejected. This international service administered by the World-Wide Navigational Warning Service is transmitted on a single frequency (518 kHz) in accordance with a carefully coordinated schedule. Established initially in the Baltic Sea in 1979, NAVTEX is fully operational in several areas, including the United States, and is being extended worldwide. Its information is intended for coastal waters up to 400 miles from shore and is uniquely tailored to a specific area.

18. The international NAVTEX service on 518 kHz provides the primary means for disseminating maritime safety information. To augment the international NAVTEX service, INMARSAT is developing a similar service to provide safety information in mid-ocean areas or where it may not be feasible to establish the NAVTEX service. By using the group calling feature of INMARSAT, it is possible to direct messages, such as local storm warnings, to specific geographic areas.[7] Such messages could be broadcast to the appropriate ocean region via a coast earth station. They would be transmitted by the coast earth station according to their priority, *i.e.*, distress, urgency, safety, routine, and commercial correspondence as specified in the Radio Regulations. The message format, patterned after that used for NAVTEX, will enable ship receivers to print only those messages pertaining to its requirements.

19. In addition, several terrestrial frequencies have been allocated for maritime safety information. The frequency 490 kHz has been allocated for national transmissions, such as, non-English language programming, and 8 HF frequencies have been designated to provide terrestrial broadcasts. These frequencies are allocated to provide additional maritime safety information or, in the case of the HF frequencies, as an alterative to the INMARSAT service. They are not an alternative to the international NAVTEX service.

20. The GMDSS will combine the COSPAS-SARSAT, INMARSAT, terrestrial, and NAVTEX systems (each appropriate to its geographic area) into one global system to improve the overall safety of life at sea. Internationally, it will be phased in from February 1, 1992, to February 1, 1999. During this 7 year period, both the present distress and safety system and the new GMDSS will be operational. The implementation dates are as follows:

> February 1, 1992: voluntary compliance, any ship may be GMDSS equipped;
>
> February 1, 1995: new compulsory ships must be GMDSS equipped; and
>
> February 1, 1999: all compulsory ships must be GMDSS equipped.

Internationally, the GMDSS provides that all compulsory ships must be equipped as of August 1, 1993, with a satellite EPIRB and, if it sails within an international NAVTEX service area, a NAVTEX receiver.

V. DISCUSSION

21. The GMDSS represents more than a decade of work to improve maritime safety worldwide. The United States has been a strong advocate of the GMDSS. The actions taken by the 1988 IMO Conference and the 1987 Mobile WARC generally reflect U.S. objectives. We herein propose to incorporate the applicable provisions of the SOLAS Convention and the international Radio Regulations into the Commission's Rules. The proposed rules are contained in the attached Appendix. They would apply to all compulsory vessels, *i.e.*, cargo ships 300 gross tons and over and all passenger ships that carry more than twelve passengers regardless of size as specified in the SOLAS Convention or Title III, Part II of the Act. We propose the same 7 year transitional time period for U.S. ships as is prescribed internationally. That is, any ship may start to fit GMDSS equipment on a voluntary basis as of February 1, 1992. Further, the proposed rules would apply to compulsory ships constructed after February 1, 1995, and all compulsory ships in service after February 1, 1999.

22. *Ship carriage requirement.* We propose that U.S. compulsory ships be required to carry equipment to perform in accordance with GMDSS provisions. Operationally, the proposed set of equipment must perform the following functions: (1) transmitting ship-to-shore distress alerting by two independent means; (2) receiving of shore-to-ship distress alerts; (3) transmitting and receiving ship-to-ship distress alerts; (4) transmitting and receiving search and rescue coordinating communications; (5) transmitting and receiving on-scene communications; (6) transmitting and receiving locating signals; (7) transmitting and receiving maritime safety information; (8) transmitting and receiving shore-based general communications; and (9) transmitting and receiving bridge-to-bridge communications between ships.

23. The particular complement of equipment to perform these functions varies by sea area and each function has several equipment options. The full equipment requirements are not detailed here but are set out in § 80.1085 through § 80.1093 of the attached Appendix. As a general matter, we expect most compulsory U.S. ships to equip for sea areas A1, A2, and A3. Consequently, under the proposed rules for GMDSS, they would carry the following set of radio equipment: a VHF radio installation capable of DSC and radiotelephony transmissions, a MF radio installation capable of DSC and radiotelephony transmissions, a INMARSAT-A or INMARSAT-C ship earth station (or a HF radio installation capable of DSC, narrow-band direct-printing, and radiotelephony transmissions), a satellite EPIRB, a NAVTEX receiver, a 9 GHz radar transponder, and, until February 1, 1999, a 2182 kHz watch receiver and auto alarm device. Radio equipment for survival craft normally would consist of three two-way VHF radiotelephones and two 9 GHz radar transponders (one of which may be the ship radar transponder).

24. A few of these requirements are discussed here. First, in accordance with GMDSS provisions, we propose that every compulsory ship have two separate and independent means of performing the alerting function. Further, these two methods of alerting must be performed using different radiocommunications systems. That is, a ship must be capable of transmitting a distress alert using two of the following three systems: terrestrial, INMARSAT, or COSPAS-SARSAT. There are two exceptions to this rule. Area A1 ships may be equipped with both a VHF primary transmitter and a VHF EPIRB where both means of alerting would be dependent upon VHF terrestrial service. Likewise, area A3 ships may be equipped with a ship earth station and an L-band EPIRB; again both means of alerting are dependent upon one system, the highly reliable INMARSAT system.

25. Under the GMDSS provisions, the required primary radio equipment is dependent upon the ship's area of operation. Ships may be required to carry VHF, MF, or HF radio equipment, a ship earth station, or a combination of these. All ships are required to carry VHF radio equipment capable of operating on VHF distress frequencies: DSC frequency 156.525 MHz (Channel 70), and radiotelephony frequencies 156.3 MHz (Channel 6), 156.650 MHz (Channel 13), and 156.8 MHz (Channel 16). A VHF radio installation capable of operating on these VHF distress frequencies plus a DSC Channel 70 watch receiver will be referred to as VHF safety equipment.[8] Generally, ships that operate only in waters where a sea area A1 has been established must carry a VHF radio installation capable of general VHF communications in addition to the VHF safety equipment noted above. Ships sailing in areas A1 and A2 must carry the VHF safety equipment, and MF radio equipment that is capable of general MF communications and operation on DSC frequency 2187.5 kHz and radiotelephony frequency 2182 kHz, plus a DSC 2187.5 kHz watch receiver. Ships sailing in areas A1, A2, and A3 must carry VHF and MF safety equipment and either an INMARSAT ship earth station or a MF/HF radio installation.[9] Ships sailing into area A4 must carry VHF and MF safety equipment plus a MF/HF radio installation. We propose to require U.S. compulsory ships to carry the primary radio equipment as specified by the GMDSS provisions and listed in the Appendix. By providing for the full range of radio equipment, U.S. ships will have the flexibility to exercise all aspects of the GMDSS as the system matures.

26. In addition to the primary equipment noted above, we propose that all compulsory ships be required to carry an EPIRB, a NAVTEX receiver, a 9 GHz radar transponder, and, until February 1, 1999, a 2182 kHz watch receiver/auto alarm. In accordance with GMDSS provisions, we propose that ships be equipped with a satellite EPIRB and NAVTEX receiver as of August 1, 1993. (The other equipment will follow the 7 year transition period.)

27. In accordance with GMDSS provisions, we propose that the satellite EPIRB be either the 406 MHz or L-band EPIRB. In the case of area A1 ships, we also propose that a Channel 70 EPIRB be permitted as an alternative to the satellite EPIRBs. At present, only the 406 MHz EPIRB is in operation. The L-band EPIRB is in pre-operational testing and the Channel 70 EPIRB has not been developed. To provide for the options permitted under the GMDSS, however, we propose to permit the use of all three EPIRBs. This would allow the L-band and Channel 70 EPIRBs to be used upon equipment authorization by the Commission.

28. We also propose that all compulsory ships be equipped with a NAVTEX receiver to receive maritime safety information. The GMDSS provisions permit ships that operate in non-NAVTEX service areas to be equipped with alternative maritime safety information receivers (*i.e.*, INMARSAT or HF band). The U.S. Coast Guard has established NAVTEX service along the East, West, and Gulf coasts of the United States. Consequently, we pro-

pose that all compulsory ships be equipped with NAVTEX receivers because all will eventually sail in NAVTEX service areas. In addition to the NAVTEX receiver, we propose that ships sailing outside NAVTEX areas but within INMARSAT coverage areas also be equipped with a radio facility for receiving INMARSAT maritime safety information, unless the voyage is exclusively within areas where HF maritime safety information is provided. Ships that sail exclusively in areas where HF maritime safety information is provided, may use, in addition to NAVTEX receivers, HF equipment in lieu of INMARSAT equipment to receive the safety broadcasts.

29. In accordance with GMDSS provisions, we propose to require compulsory ships to be equipped with a 9 GHz radar transponder that is stowed where it can be used easily and placed rapidly into survival craft.[10] This requirement will assist rescue units to locate ships and survival craft during search and rescue operations. The GMDSS also provides for continued use of international distress frequency 2182 kHz as a link between the existing ship-to-ship system and the new ship-to-shore system during the transition phase from 1992 to 1999. Consequently, our proposed rules would require all compulsory ships, except for area A1 ships, to carry a 2182 kHz watch receiver and an automatic alarm device until February 1, 1999. Under the GMDSS, compulsory ships would no longer be required to carry Morse code (500 kHz) radiotelegraphy equipment but would continue to carry radio equipment capable of operating on VHF distress Channel 16 (see discussion above).

30. We propose that survival craft be equipped with two-way VHF radiotelephones and 9 GHz radar transponders. The GMDSS provisions require three VHF radiotelephones and two radar transponders (one of which may be the ship radar transponder) for all passenger ships regardless of size and cargo ships over 500 gross tons and only two VHF radiotelephones and one transponder for cargo ships between 300-500 gross tons. The proposed rules listed in the Appendix reflect these requirements.

31. *Equipment standards and authorization*. To ensure the performance of equipment for distress and safety communications, the International Radio Consultative Committee (CCIR) and IMO have established performance standards for the required equipment. The GMDSS provisions also require that the radio equipment be approved before use. We propose that all GMDSS equipment be type accepted by the Commission, except equipment used in the INMARSAT system. We propose that INMARSAT equipment be notified by the Commission.[11] Because the INMARSAT equipment is type approved by INMARSAT, notification should be sufficient to ensure performance. The proposed rules require all GMDSS equipment to meet the IMO and CCIR standards and incorporate the standards into the Commission's Rules by reference. Non-INMARSAT equipment would be type accepted by the Commission for compliance with the IMO and CCIR performance standards based on the representations and test data submitted by the applicant. For INMARSAT equipment, applicants must attest that the equipment meets the IMO and CCIR performance standards and include a copy of the INMARSAT type approval certificate.[12] Finally, our current Rules require that applicants for type acceptance of compulsory equipment, except for radar equipment, submit with their application a working unit of the type for which type acceptance is required. We propose that GMDSS equipment not be submitted unless specifically requested by the Commission.

32. *Operating procedures*. We propose to amend the Commission's maritime distress and safety rules to incorporate the operating procedures provided for under the GMDSS. For GMDSS fitted vessels, the proposed rules would replace the manual method of sending a Morse code "SOS" or radiotelephone "MAYDAY" call and distress message with a simple and automatic means of distress alerting. Ships would transmit a distress alert (1) through satellites either with absolute priority on general communication channels or on exclusive distress and safety frequencies; or (2) on the distress and safety frequencies in the VHF, MF, or HF bands using DSC. The DSC distress alert will automatically identify the station in distress and its position and provide other information that might facilitate rescue. A distress alert will normally be activated and acknowledged manually. When a ship sinks, however, a float-free satellite EPIRB would be automatically activated. Subsequent to the distress alert, search and rescue and on-scene communications would be conducted by narrow-band direct-printing or radiotelephony. The GMDSS provisions do not provide for transmission of distress and safety information using Morse code radiotelegraphy. The proposed rules reflect this change.

33. Under the GMDSS, ship stations will continue to maintain a watch for distress alerts, but the use of automatic equipment would remove the burden currently associated with these watches. Thus, we propose to delete the manual Morse code watch on 500 kHz and require that ship stations maintain watches in accordance with GMDSS provisions. Depending upon the equipment fitted, compulsory ships would be required to maintain a continuous automatic watch on DSC safety frequencies Channel 70, 2187.5 kHz, 8414.5 kHz, and one other HF DSC distress and safety frequency. A watch for satellite shore-to-ship distress alerts also would be required if the ship is fitted with an INMARSAT ship earth station. Further, every ship would be required to maintain an automated watch for maritime safety information. Finally, ships would continue to maintain a manual watch on Channel 16 and to use an automated watch receiver on 2182 kHz until February 1, 1999. This requirement is necessary to maintain a link with the current distress and safety system until full implementation of the GMDSS.[13]

34. For public coast stations, we propose no changes to their watch requirements. They would continue their radiotelegraphy safety watch on 500 kHz and the radiotelephony safety watches on Channel 16 and 2182 kHz.[14] Also, we propose no additional GMDSS watches be required for public coast stations. As the GMDSS is defined, only certain coast stations (and coast earth stations) are designated to maintain the DSC frequency watches. As currently planned, no United States public coast stations are contemplated to provide safety watches under the GMDSS. Nevertheless, public coast stations may become aware of distress alerts during their general operation.[15] In those situations, we propose that public coast stations defer their response so that a Rescue Coordination Center may acknowledge, and, where an acknowledgement is not forthcoming in a timely manner (*i.e.*, 3 minutes), that the coast station ensure that the distress alert is routed to a Rescue Coordination Center and provide whatever assistance is requested by the U.S. Coast Guard.

35. For coast earth stations, we are proposing new requirements. INMARSAT is an integral part of the GMDSS, and in the United States, coast earth stations are licensed under the Commission's Rules to Communications Satellite Corporation (COMSAT), the U.S. signatory to INMARSAT. Thus, we propose, in accordance with GMDSS provisions, to require coast earth stations to relay a distress alert as soon as possible to a Rescue Coordination Center. Further, we propose that no charge be made for the transmission of distress messages and replies thereto in connection with situations involving the safety of life and property at sea (see 47 U.S.C. § 357(d)), but seek comment on the definition and scope of this traffic as set forth at § 80.1119(b) in the attached Appendix.[16] This is similar to the present requirement for public coast stations carrying distress and safety messages (see 47 C.F.R. § 80.95).

36. *Radio operators and maintainers*. The role of radio operators under the GMDSS was a contentious issue at both the 1988 IMO Conference and the 1987 Mobile WARC. The present regulations require that ships fitted with radiotelegraphy equipment include a licensed radio operator trained in Morse code. As mentioned previously, the use of automatic communication equipment which is easier to operate has reduced the need to have specially skilled radio operators on-board ships. Nevertheless, there was general agreement that every ship must carry personnel qualified for distress and safety communications. Many Administrations maintained that there is no need to have a radio operator on-board ship for maintenance purposes. Other Administrations insisted there should be a requirement for an individual capable of performing on-board maintenance and emergency repairs of radio equipment.

37. The 1988 IMO Conference reached a compromise position. It separated the two functions of radio operation and equipment maintenance. The Final Acts of the 1988 IMO Conference state that every ship shall carry radio personnel who hold certificates specified in the international Radio Regulations. For maintenance, it states that "[o]n ships engaged on voyages in sea areas A1 and A2, the availability shall be ensured by using such methods as duplication of equipment, shore-based maintenance or at-sea electronic maintenance capability, or a combination of these, as may be approved by the Administration."[17] In areas A3 and A4, a combination of at least two of these methods must be used. Thus, the IMO allows flexibility for maintaining the shipboard equipment carried for safety and distress purposes.

38. Amendments adopted at the 1987 Mobile WARC specified four certificates for ship personnel and enacted mandatory requirements for radio electronics personnel to be on-board many vessels. The four categories of certificates are as follows: First-Class Radio Electronics Certificate; Second-Class Radio Electronics Certificate; General Operator's Certificate; and Restricted Operator's Certificate. The first two certificates differ from the latter two certificates in that they include more extensive knowledge concerning the maintenance of shipboard equipment. Furthermore, the amendments require ships that sail beyond the range of MF coast stations (*i.e.*, ships that sail in areas A3 and A4) to carry personnel holding First or Second Class Radio Electronics Certificates.

39. The United States did not agree with the mandatory requirements adopted by the 1987 Mobile WARC that ships carry personnel qualified for the on-board maintenance of shipboard radio and electronic equipment.[18] These requirements would be inconsistent with the actions of the IMO that endorsed the principle of flexibility of methods for maintaining shipboard equipment. Because the United States did not support this mandatory requirement, the United States delegation took reservations on the revisions to Articles 55 and 56. At the 1987 Mobile WARC, the United States was joined by 23 other countries in reservations on Articles 55 and 56. Four other countries took similar reservations at the 1989 Plenipotentiary Conference in Nice, France. Consequently, nearly two-thirds of the world's shipping tonnage ultimately opposed the mandatory requirements for radio electronic personnel to be on-board vessels. Because the United States took the reservation, the Commission can provide its licensees with the flexibility provided by the Final Acts of the 1988 IMO Conference without conflict with the requirements of the international Radio Regulations.[19]

40. We therefore propose to follow the IMO requirements regarding the operation of radio equipment on-board ships. For radio operator licenses, we propose to add a new GMDSS endorsement to the Commission's Rules that reflects the skills necessary to operate the GMDSS equipment. This endorsement would be based on the requirements contained in the General Operator's and Restricted Operator's Certificates adopted by the 1987 Mobile WARC. The GMDSS endorsement would be affixed to the First or Second Class Radiotelegraph Operator's Certificates (T-1 or T-2), General Radiotelephone Operator License (G), or Marine Radio Operator Permit (MP) after an operator has demonstrated, through a written examination given by the Commission, satisfactory knowledge of the GMDSS practices and procedures.[20] We further propose that GMDSS compulsory ships (*i.e.*, ships subject to the SOLAS Convention or Title III, Part II of the Act that equip in accordance with the proposed Subpart W) carry personnel that hold a GMDSS endorsed certificate. No GMDSS endorsement is proposed for ships that are voluntarily-fitted with GMDSS equipment. These ships would continue to be governed by the radio operator provisions of 47 C.F.R. § 80.165.

41. For maintenance, we propose to allow our licensees the choice of duplication of equipment, shore-based maintenance, or at-sea maintenance, as prescribed in the Final Acts of the 1988 IMO Conference.[21] In sea areas A3 and A4, a combination of at least two of these methods would be required. Because both shore-based maintenance and duplication of equipment are basically straightforward, we believe that no further requirements or licensing are necessary. The requirement is simply that all distress equipment must be functioning when the ship leaves port. We view at-sea maintenance differently. Certainly some training and minimal electronics skill is required for the individual providing the at-sea maintenance, especially since extensive facilities and technical expertise are not as conveniently available at sea as on shore. We request comments on whether a certificate is needed for at-sea maintainers to assure the functioning of equipment during a distress situation. Although shore-based maintenance and duplication of equipment appear to be the best methods for ensuring that equipment is available for distress communications, we also wish to allow our ship owners the flexibility of at-sea maintenance as permitted under international provisions. Comments should address whether the maintainer should be licensed and whether

the Commisson, the U.S. Coast Guard, or private schools should issue the license. Would an electronics engineering degree be acceptable? Comments should also indicate whether specific standards should be defined in the Commission's Rules and what they might be. Finally, comments should address whether at-sea maintenance is a viable option considering the complexity of some of the advanced equipment and the apparent difficulty in making repairs.

VI. CONCLUSION

42. We propose to amend the Commission's Rules to include the provisions of the GMDSS.[22] The GMDSS will bring to the ships of the world a unified satellite technology, automatic connections to shore and to other ships, automatic reception of maritime safety information, and rapid distress communications with Rescue Coordination Centers. It provides flexibility for choosing equipment and maintenance options and establishes new radio operator requirements. The proposed changes will improve the safety of life at sea for the maritime community by providing a more efficient and reliable distress system. This system has been supported by ships owners and operators and early implementation should improve their competitive position in the worldwide shipping industry.

43. Newly constructed or existing vessels that wish to install the GMDSS equipment as of February 1, 1992, would be required to carry dual sets of equipment and Morse code radiotelegraph operators dedicated to radio operations if the Communications Act is not amended. Thus, we expect few owners to fit their ships voluntarily unless the Communications Act is amended since incurring this cost in addition to the cost of the radiotelegraphy operator would place U.S. ships at a competitive disadvantage. The operational costs to U.S. shipping companies required to carry currently required equipment and personnel is estimated to be millions of dollars per year. The GMDSS would significantly reduce operating costs by providing for the use of automated systems and eliminating the dedicated radio operator requirement while increasing safety. Thirteen countries with strong merchant marines already have authorized their vessels to equip with GMDSS equipment.

VII. REGULATORY FLEXIBILITY ACT ANALYSIS

44. In accordance with Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), the Commission certifies that these rules would not, if promulgated, have a significant economic impact on a substantial number of small entities. As discussed above, the proposed rules would apply to cargo ships of 300 gross tons and over and passenger ships that carry more than twelve passengers engaged on international voyages subject to the SOLAS Convention or voyages in the open sea subject to Title III, Part II of the Act. The proposed rules would not apply to smaller vessels, such as recreational or fishing vessels. Cargo or passenger ships licensed by the United States that travel on the open sea or on international voyages typically are not owned or operated by small entities. Accordingly, the proposed rules would not affect a substantial number of small entities.

VIII. PAPERWORK REDUCTION ACT STATEMENT

45. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

IX. PROCEDURAL MATTERS

46. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

47. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

48. Any person who is making an oral *ex parte* presentation that presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

49. Authority for issuance of this Notice is contained in Sections 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 7, 1991** and reply comments on or before

February 6, 1991. Extensions of time are not contemplated. All relevant and timely comments will be considered by the Commission before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

50. IT IS ORDERED that a copy of this *Notice* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 13 and 80 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

1. The authority citation for Part 13 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

2. In Section 13.2, paragraph (c)(4) is added to read as follows:

§ 13.2 Classification of operator licenses and endorsements.

* * * * *

(c) * * *

(4) GMDSS endorsement (First and Second Class Radiotelegraph Operator's Certificates, General Radiotelephone Operator License, and Marine Radio Operator Permit).

* * * * *

3. In Section 13.21, paragraph (a)(9) is added to read as follows:

§ 13.21 Examination elements.

(a) * * *

(9) *GMDSS operating practices.* Radio operating procedures and practices of the knowledge and qualifications enumerated below:

(i) detailed practical knowledge of the operation of all GMDSS sub-systems and equipment;

(ii) ability to send and receive correctly by radio telephone and narrow-band direct-printing telegraphy;

(iii) detailed knowledge of the regulations applying to radiocommunications, knowledge of the documents relating to charges for radiocommunications and knowledge of those provisions of the International Convention for the Safety of Life at Sea which relate to radio; and

(iv) sufficient knowledge of English to be able to express themselves satisfactorily both orally and in writing.

* * * * *

4. In Section 13.22, paragraph (d) is added to read as follows:

§ 13.22 Required qualifications.

* * * * *

(d) To qualify for the GMDSS endorsement, an applicant must demonstrate a satisfactory knowledge of the material required for a First or Second Class Radiotelegraph Operator's Certificate, General Radiotelephone Operator License, or Marine Radio Operator Permit, plus the material required for passing the written examination covering element 9.

5. The table of contents for Part 80 is amended by removing Subpart W from "reserved" status, adding the section headings, and republishing the authority citation for Part 80 to read as follows:

PART 80 - STATIONS IN THE MARITIME SERVICES

* * * * *

Subpart W - Global Maritime Distress and Safety System (GMDSS)

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OPERATING PROCEDURES FOR DISTRESS AND SAFETY COMMUNICATIONS

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80.1123 Watch requirements for ship stations
80.1125 Search and rescue coordinating communications
80.1127 On-scene communications
80.1129 Locating and homing signals
80.1131 Transmissions of urgency communications
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80.1135 Transmission of maritime safety information

* * * * *

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. 151 - 155, 301 - 609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

6. Subpart W is added to read as follows:

Subpart W - Global Maritime Distress and Safety System (GMDSS)

This subpart contains the rules applicable to the Global Maritime Distress and Safety System (GMDSS). Every ship of the United States subject to Part II of Title III of the Communications Act or the Safety Convention must comply with the provisions of this subpart. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflict, the provisions of this subpart shall govern with respect to the GMDSS. For the purposes of this subpart, distress and safety communications includes distress, urgency, and safety calls and messages.

NOTE: No provision of this subpart is intended to eliminate, or in anyway modify, other requirements contained in this part with respect to Part II of Title III of the Communications Act unless changes to the Communications Act are adopted by the U.S. Congress and notice is published in the Federal Register.

GENERAL PROVISIONS

§ 80.1065 Applicability.

(a) The regulations contained in § 80.1119 of this subpart apply to public coast stations and coast earth stations as of February 1, 1992.

(b) The regulations contained within this subpart apply to all passenger ships regardless of size and cargo ships of 300 gross tons and upwards as follows:

(1) Ships must comply with §§ 80.1085(a)(4) and 80.1085(a)(6) of this part not later than August 1, 1993.

(2) Ships constructed on or after February 1, 1995, must comply with all requirements of this subpart.

(3) Ships constructed before February 1, 1995, must comply with all requirements of this subpart as of February 1, 1999.

(4) During the period between February 1, 1992, and February 1, 1999, all ships must comply with:

(i) the requirements of this subpart; or

(ii) the requirements of Chapter IV of the International Convention for the Safety of Life at Sea, 1974, in force prior to February 1, 1992. (*See* Subparts Q and R of this part.)

(5) The expression "ships constructed" means "ships the keels of which are laid, or construction identifiable with a specific ship begins and assembly of that ship has commenced comprising at least 50 gross tons or 1% of the estimated mass of all structural material, whichever is less."

(c) The requirements of this subpart do not modify the requirements for ships navigated on the Great Lakes. The requirements contained in the Agreement Between the United States of America and Canada for Promotion of Safety on the Great Lakes by Means of Radio, 1973, continue to apply (see subpart T of this part).

(d) No provision in this subpart is intended to prevent the use by any ship, survival craft, or person in distress, of any means at their disposal to attract attention, make known their position and obtain help.

§ 80.1067 Inspection of station.

(a) Ships must have the required equipment inspected at least once every 12 months. If the ship is in compliance with the requirements of the Safety Convention, a Safety Certificate will be issued; if in compliance with the Communications Act, the license will be endorsed accordingly. The effective date of the ship safety certificate is the date the station is found to be in compliance or not later than one business day later.

(b) Certificates issued in accordance with the Safety Convention must be posted in a prominent and accessible place on the ship.

§ 80.1069 Maritime sea areas.

For the purpose of this subpart, a ship's area of operation is defined as follows:

Sea area A1. An area within the radiotelephone coverage of at least one VHF coast station in which continuous DSC alerting is available as defined by the International Maritime Organization.

Sea area A2. An area, excluding sea area A1, within the radiotelephone coverage of at least one MF coast station in which continuous DSC alerting is available as defined by the International Maritime Organization.

Sea area A3. An area, excluding sea areas A1 and A2, within the coverage of an INMARSAT geostationary satellite in which continuous alerting is available.

Sea area A4. An area outside sea areas A1, A2 and A3.

§ 80.1071 Exemptions

(a) In certain circumstances, partial or conditional exemptions may be granted to individual ships from the requirements of §§ 80.1085, 80.1087, 80.1089, 80.1091, and 80.1093 of this part provided: such ships comply with the functional requirements of § 80.1081 of this part and a showing is made that such an exemption will not have a material effect upon the general efficiency of the service for the safety of all ships.

(b) An exemption may be granted under paragraph (a) of this section only:

(1) if the conditions affecting safety are such as to render the full application of §§ 80.1085, 80.1087, 80.1089, 80.1091, and 80.1093 of this part unreasonable or unnecessary or otherwise not in the public interest;

(2) in exceptional circumstances, for a single voyage outside the sea area or sea areas for which the ship is equipped; or

(3) prior to February 1, 1999, when the ship will be taken permanently out of service within two years of the requirement date specified in § 80.1065 of this part.

§ 80.1073 Radio personnel

(a) Ships must carry personnel qualified for distress and safety radiocommunication purposes. The personnel must hold GMDSS endorsed certificates applicable under this section, any one of whom may be designated to have primary responsibility for radiocommunications during distress incidents.

(b) The following licenses are issued with GMDSS endorsements for personnel of ship stations and ship earth stations using the frequencies and techniques prescribed in this subpart. For the purposes of this subpart, no order is intended by this listing or the alphanumeric designator.

(1) T-1. First Class Radiotelegraph Operator's Certificate;

(2) T-2. Second Class Radiotelegraph Operator's Certificate;

(3) G. General Radiotelephone Operator License;

(4) MP. Marine Radio Operator Permit.

(c) A person holding one of the GMDSS endorsed certificates specified in paragraph (b) of this section must be available to act as a dedicated communications operator in cases of distress.

(d) The personnel of ship stations for the radio installation must have as a minimum one of the GMDSS endorsed certificates specified in paragraph (b) of this section.

§ 80.1075 Radio records

A record must be kept, as required by the Radio Regulations and § 80.409(a) through (e) of this part, of all incidents connected with the radiocommunication service which appear to be of importance to safety of life at sea.

§ 80.1077 Frequencies available

The following table describes the frequencies used in the Global Maritime Distress and Safety System:

Alerting	
406 EPIRBs	406-406.1 MHz
L-band EPIRB	1645.5-1646.5 MHz
INMARSAT A or C SES	1626.5-1645.5 MHz
VHF DSC Ch. 70	156.525 MHz[1]
MF/HF DSC[2]	2187.5 kHz[3], 4207.5 kHz, 6312 kHz, 8414.5 kHz, 12577 kHz, and 16804.5 kHz
On-scene communications	
VHF Ch. 16	156.8 MHz
MF radiotelephony	2182 kHz
NBDP	2174.5 kHz
Communications involving aircraft	
On-scenes, including search and rescue	156.8 MHz[4], 121.5 MHz[5], 123.1 MHz, 156.3 MHz, 2182 kHz, 3023 kHz, 4125 kHz, and 5680 kHz[6]
Locating signals	
9 GHz radar transponders	9200-9500 MHz
Maritime safety information (MSI)	
International NAVTEX	518 kHz[7]
Warnings and urgent	490 kHz[8], 4209.5 kHz[9]
NBDP	4210 kHz, 6314 kHz, 8416.5 kHz, 12579 kHz, 16806.5 kHz, 19680.5 kHz, 22376 kHz, 26100.5 kHz
Satellite	1530-1545 MHz
General distress and safety communications and calling	
Satellite	1530-1544 MHz (space-to-Earth) and 1626.5-1645.5 MHz (Earth-to-space)[10]
Radiotelephony	(2182 kHz, 4125 kHz, 6215 kHz, 8291 kHz, 12290 kHz, 16420 kHz, and 156.8 MHz
NBDP	2174.5 kHz, 4177.5 kHz, 6268 kHz, 8376.5 kHz, 12520 kHz, and 16695 kHz
DSC	2187.5 kHz, 4207.5 kHz, 6312 kHz, 8414.5 kHz, 12577 kHz, 16804.5 kHz, and 156.525 MHz

Survival craft	
VHF radiotelephony	156.8 MHz and one other 156-174 MHz frequency
Radar transponder	9200-9500 MHz
DSC	2187.5 kHz, 8414.5 kHz, and 156.525 MHz

FOOTNOTES

[1] Frequency 156.525 MHz can be used for ship-to-ship alerting and, if within sea area A1, for ship-to-shore alerting.

[2] For ships equipped with MF/HF equipment, there is a watch requirement on 2187.5 kHz, 8414.5 kHz, and one other frequency.

[3] Frequency 2187.5 kHz can be used for ship-to-ship alerting and, if within sea areas A1 or A2, for ship-to-shore alerting.

[4] Frequency 156.8 MHz may also be used by aircraft for safety purposes only.

[5] Frequency 121.5 MHz may be used for situations associated with aeronautical distress and urgency operations only.

[6] Frequencies 123.1 MHz, 3023 kHz, and 5680 kHz can be used by land stations engaged in coordinated search and rescue operations.

[7] The international NAVTEX frequency 518 kHz is the primary frequency for receiving maritime safety information. The other frequencies are used only to augment the coverage or information provided on 518 kHz.

[8] Frequency 490 kHz cannot be used for MSI employing NBDP transmissions until February 1, 1999.

[9] Frequency 4209.5 kHz is not used in the United States (see footnote 520A of § 2.106 of Part 2).

[10] In addition to EPIRBs, 1544-1545 MHz can be used for narrowband distress and safety operations and 1645.5-1646.5 MHz can be used for relay of distress alerts.

EQUIPMENT REQUIREMENTS FOR SHIP STATIONS

§ 80.1081 Functional requirements

(a) Ships, while at sea, must be capable:

(1) except as provided in §§ 80.1087(a)(1) and 80.1091(a)(4)(iii), of transmitting ship-to-shore distress alerts by at least two separate and independent means, each using a different radiocommunication service;

(2) of receiving shore-to-ship distress alerts;

(3) of transmitting and receiving ship-to-ship distress alerts;

(4) of transmitting and receiving search and rescue co-ordinating communications;

(5) of transmitting and receiving on-scene communications;

(6) of transmitting and receiving signals for locating;

(7) of transmitting and receiving maritime safety information;

(8) of transmitting and receiving general radiocommunications to and from shore-based radio systems or networks; and

(9) of transmitting and receiving bridge-to-bridge communications.

§ 80.1083 Ship radio installations

(a) Ships must be provided with radio installations capable of complying with the functional requirements prescribed by § 80.1081 of this part throughout its intended voyage and, unless exempted under § 80.1071 of this part, complying with the requirements of § 80.1085 of this part and, as appropriate for the sea area of areas through which it will pass during its intended voyage, the requirements of either §§ 80.1087, 80.1089, 80.1091, or 80.1093 of this part.

(b) The radio installation must:

(1) be so located that no harmful interference of mechanical, electrical or other origin affects its proper use, and so as to ensure electromagnetic compatibility and avoidance of harmful interaction with other equipment and systems;

(2) be so located as to ensure that the greatest possible degree of safety and operational availability;

(3) be protected against harmful effects of water, extremes of temperature and other adverse environmental conditions;

(4) be provided with reliable, permanently arranged electrical lighting, independent of the main and emergency sources of electrical power, for the adequate illumination of the radio controls for operating the radio installation; and

(5) be clearly marked with the call sign, the ship station identity and other codes as applicable for the use of the radio installation.

(c) Control of the VHF radiotelephone channels required for navigational safety must be immediately available on the navigating bridge convenient to the conning position and, where necessary, facilities should be available to permit radiocommunications from the wings of the navigating bridge. Portable VHF equipment may be used to meet the latter provision.

§ 80.1085 Ship radio equipment - General

(a) Ships must be provided with:

(1) a VHF radio installation capable of transmitting and receiving:

(i) DSC on the frequency 156.525 MHz (channel 70), and it must be able to initiate the transmission of distress alerts on channel 70 from the position from which the ship is normally navigated; and

(ii) radiotelephony on the frequencies 156.300 MHz (channel 6), 156.650 MHz (channel 13), and 156.800 MHz (channel 16);

(2) a radio installation capable of maintaining a continuous DSC watch on VHF channel 70 which may be separate from, or combined with, that required by paragraph (a)(1)(i) of this section;

(3) a radar transponder capable of operating in the 9 GHz band, which must be stowed so that it is easily operated (and which may be one of those required by § 80.1095(b) of this part for a survival craft);

(4) a receiver capable of receiving international NAVTEX service broadcasts;

(5) a radio facility for reception of maritime safety information by the INMARSAT enhanced group calling system if the ship is engaged on voyages in any area of INMARSAT coverage in which an international NAVTEX service is not provided (this requirement does not apply

to ships engaged exclusively on voyages in areas where an HF direct-printing telegraphy maritime safety information service is provided and the ship is fitted with equipment capable of receiving such service); and

(6) subject to the provisions of § 80.1087(c), a satellite emergency position-indicating radio beacon (satellite EPIRB) which must be:

(i) capable of transmitting a distress alert either through the polar orbiting satellite service operating in the 406 MHz band or, if the ship is engaged only on voyages within INMARSAT coverage, through the INMARSAT geostationary satellite service operating in the 1.6 GHz band (subject to the availability of appropriate receiving and processing ground facilities for each ocean region covered by INMARSAT as approved by the International Maritime Organization); and

(ii) installed in an easily accessible position, ready to be manually released and capable of being carried by one person into a survival craft, capable of floating free if the ship sinks and of being automatically activated when afloat, and capable of being activated manually.

(b) Until February 1, 1999, all ships must be equipped with a radio installation consisting of a radiotelephone distress frequency 2182 kHz watch receiver prescribed by § 80.807 of this part. This requirement does not apply to ships constructed on or after February 1, 1997.

(c) Until February 1, 1999, all ships, except ships engaged on voyages in sea area A1 only, must be equipped with a device for generating the 2182 kHz radiotelephone alarm signal as prescribed by § 80.807 of this part. This requirement does not apply to ships constructed on or after February 1, 1997.

§ 80.1087 Ship radio equipment - Sea area A1

(a) In addition to meeting the requirements of § 80.1085 of this part, ships engaged on voyages exclusively in sea area A1 must be provided with a radio installation capable of initiating the transmission of ship-to-shore distress alerts from the position from which the ship is normally navigated, operating either:

(1) on VHF using DSC (the EPIRB prescribed by paragraph (c) of this section can be used to fulfill this requirement by either installing the EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated); or

(2) through the polar orbiting satellite service on 406 MHz (this requirement may be fulfilled by the satellite EPIRB, required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated); or

(3) on MF using DSC if the ship is engaged on voyages within coverage of MF coast stations equipped with DSC; or

(4) on HF using DSC; or

(5) through the INMARSAT geostationary satellite service if within INMARSAT coverage. This requirement may be fulfilled by:

(i) an INMARSAT A or C ship earth station capable of two way communication; or

(ii) the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated.

(b) The VHF radio installation, required by § 80.1085(a)(1) of this part, must also be capable of transmitting and receiving general radiocommunications using radiotelephony.

(c) Ships engaged on voyages exclusively in sea area A1 may carry, in lieu of the satellite EPIRB required by § 80.1085(a)(6) of this part, an EPIRB which must be:

(1) capable of transmitting a distress alert using DSC on VHF channel 70 and providing for locating by means of a radar transponder operating in the 9 GHz band;

(2) installed in an easily accessible position, ready to be manually released and capable of being carried by one person into a survival craft, capable of floating free if the ship sinks and being automatically activated when afloat, and capable of being activated manually.

§ 80.1089 Ship radio equipment - Sea areas A1 and A2

(a) In addition to meeting the requirements of § 80.1085 of this part, ships engaged on voyages beyond sea area A1, but remaining within sea area A2, must be provided with:

(1) an MF radio installation capable of transmitting and receiving, for distress and safety purposes, on the frequencies:

(i) 2187.5 kHz using DSC; and

(ii) 2182 kHz using radiotelephony;

(2) a radio installation capable of maintaining a continuous DSC watch on the frequency 2187.5 kHz which may be separate from or combined with, that required by paragraph (a)(1)(i) of this section; and

(3) means of initiating the transmission of ship-to-shore distress alerts by a radio service other than MF operating either;

(i) through the polar orbiting satellite service on 406 MHz (this requirement may be fulfilled by the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated); or

(ii) on HF using DSC; or

(iii) through the INMARSAT geostationary satellite service if within INMARSAT coverage; this requirement may be fulfilled by:

(A) the equipment specified in paragraph (c)(2) of this section; or

(B) the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated.

(b) It must be possible to initiate transmission of distress alerts by the radio installations specified in paragraphs (a)(1) and (a)(3) of this section from the position from which the ship is normally navigated.

(c) Ships subject to this section must be capable of transmitting and receiving general radiocommunications using radiotelephony or direct-printing telegraphy by either:

(1) a radio installation operating on working frequencies in the bands between 1605-4000 kHz or between 4000-27500 kHz (this requirement may be fulfilled by the addition of this capability to the equipment required by paragraph (a)(1) of this section); or

(2) an INMARSAT ship earth station.

§ 80.1091 Ship radio equipment - Sea areas A1, A2, and A3

Ships engaged on voyages beyond sea areas A1 and A2, but remaining within sea area A3, have the option to comply with either the requirements of paragraph (a) or (b) of this section.

(a) In addition to meeting the requirements of § 80.1085 of this part, ships subject to this section must be provided with:

(1) an INMARSAT ship earth station capable of:

(i) transmitting and receiving distress and safety communications using direct-printing telegraphy;

(ii) initiating and receiving distress priority calls;

(iii) maintaining watch for shore-to-ship distress alerts, including those directed to specifically defined geographical areas;

(iv) transmitting and receiving general radiocommunications, using either radiotelephony or direct-printing telegraphy; and

(2) an MF radio installation capable of transmitting and receiving, for distress and safety purposes, on the frequencies:

(i) 2187.5 kHz using DSC; and

(ii) 2182 kHz using radiotelephony; and

(3) a radio installation capable of maintaining a continuous DSC watch on the frequency 2187.5 kHz which may be separate from or combined with that required by paragraph (a)(2)(i); and

(4) means of initiating the transmission of ship-to-shore distress alerts by a radio service operating either:

(i) through the polar orbiting satellite service on 406 MHz (this requirement may be fulfilled by the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated); or

(ii) on HF using DSC; or

(iii) through the INMARSAT geostationary satellite service, by an additional ship earth station or by the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated.

(b) In addition to meeting the requirements of § 80.1085 of this part, ships subject to this section must be provided with:

(1) an MF/HF radio installation capable of transmitting and receiving on all distress and safety frequencies in the bands between 1605-27500 kHz using DSC, radiotelephony, and narrow-band direct-printing telegraphy; and

(2) equipment capable of maintaining DSC watch on 2187.5 kHz, 8414.5 kHz and on at least one of the distress and safety DSC frequencies 4207.5 kHz, 6312 kHz, 12577 kHz, or 16804.5 kHz although it must be possible to select any of these DSC distress and safety frequencies at any time (this equipment may be separate from, or combined with, the equipment required by paragraph (b)(1) of this section); and

(3) means of initiating the transmission of ship-to-shore distress alerts by a radiocommunication service other than HF operating either:

(i) through the polar orbiting satellite service on 406 MHz (this requirement may be fulfilled by the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated; or

(ii) through the INMARSAT geostationary satellite service (this requirement may be fulfilled by:

(A) an INMARSAT ship earth station; or

(B) the satellite EPIRB required by § 80.1085(a)(6) of this part, either by installing the satellite EPIRB close to, or by allowing remote activation from, the position from which the ship is normally navigated); and

(4) in addition, ships must be capable of transmitting and receiving general radiocommunications using radiotelephony or direct-printing telegraphy by an MF/HF radio installation operating on working frequencies in the bands between 1605-4000 kHz and between 4000-27500 kHz (this requirement may be fulfilled by the addition of this capability to the equipment required by paragraph (b)(1) of this section).

(c) It must be possible to initiate transmission of distress alerts by the radio installations specified in paragraphs (a)(1), (a)(2), (a)(4), (b)(1), and (b)(3) of this section from the position from which the ship is normally navigated.

§ 80.1093 Ship radio equipment - Sea areas A1, A2, A3 and A4

In addition to meeting the requirements of § 80.1085 of this part, ships engaged on voyages in all sea areas must be provided with the radio installations and equipment required by § 80.1091(b) of this part, except that the equipment required by § 80.1091(b)(3)(ii) of this part cannot be accepted as an alternative to that required by regulation § 80.1091(b)(3)(i) of this part, which must always be provided. In addition, ships engaged on voyages in all sea areas must comply with the requirements of § 80.1091(c) of this part.

§ 80.1095 Survival craft equipment

This section applies to new ships subject to this subpart that are constructed on or after February 1, 1992, and to all ships subject to this subpart as of February 1, 1995.

(a) At least three two-way VHF radiotelephone apparatus must be provided on every passenger ship and on every cargo ship of 500 gross tons and upwards. At least two two-way VHF radiotelephone apparatus must be provided on every cargo ship of between 300-500 gross tons. Portable two-way VHF radiotelephones must be stowed in such locations that they can be rapidly placed in any survival craft other than liferafts required by Regulation III/26.1.4 of the SOLAS Convention. Alternatively, survival craft may be fitted with a fixed two-way VHF radiotelephone installation. Two-way VHF radiotelephone apparatus, portable or fixed, must conform to performance standards as specified in § 80.1101 of this part. Two-way VHF radiotelephone apparatus provided on board ships prior to February 1, 1992, and not complying fully with the performance standards specified in § 80.1101 of this part, may be used until February 1, 1999, provided it is compatible with approved two-way VHF radiotelephone apparatus.

(b) At least one radar transponder must be carried on each side of every passenger ship and every cargo ship of 500 gross tons and upwards. At least one radar transpon-

der must be carried on every cargo ship of 300 gross tons and upwards but less than 500 gross tons. Such radar transponders must conform to performance standards as specified in § 80.1101 of this part. The radar transponders must be stowed in such locations that they can be rapidly placed in any survival craft other than liferafts required on cargo ships in forward and aft areas (see Regulation III/26.1.4 of the SOLAS Convention). Alternatively, one radar transponder must be stowed in each survival craft other than those required by Regulation III/26.1.4 of the SOLAS Convention. One of these radar transponders may be the radar transponder required by § 80.1085(a)(3) of this part.

(c) Survival craft equipment must be tested at intervals not to exceed twelve months. For batteries used for survival craft equipment, the month and year of its manufacture must be permanently marked on the battery. Also, the month and year upon which 50 percent of its useful life will expire must be permanently marked on both the battery and the outside of the transmitter. Batteries must be replaced if 50 percent of their useful life has expired or if the transmitter has been used in an emergency situation.

§ 80.1097 Direction finding and homing equipment

(a) Ships of 1,600 gross tons and over must be fitted with a radio direction finding apparatus that conforms to the requirements specified in §§ 80.819, 80.821, and 80.222 of this part.

(b) Until February 1, 1999, ships of 1,600 gross tons and over constructed on or after May 25, 1990, and before February 1, 1995, must additionally have a homing capability on distress frequency 2182 kHz that conforms to the requirements specified in § 80.824 of this part.

§ 80.1099 Ship sources of energy

(a) There must be available at all times, while the ship is at sea, a supply of electrical energy sufficient to operate the radio installations and to charge any batteries used as part of a reserve source or sources of energy for the radio installations.

(b) A reserve source or sources of energy to supply radio installations must be provided on every ship for the purpose of conducting distress and safety radiocommunications for one hour, in the event of failure of the ship's main and emergency sources of electrical power. The reserve source or sources of energy must be capable of simultaneously operating the VHF radio installation required by § 80.1085(a)(1) of this part and, as appropriate for the sea area or sea areas for which the ship is equipped, either the MF radio installation required by § 80.1089(a)(1) of this part, the MF/HF radio installation required by §§ 80.1091(a)(2)(i) or 80.1093(a) of this part, or the INMARSAT ship earth station required by § 80.1091(a)(1) of this part and any of the additional loads mentioned in paragraphs (d), (e), and (h) of this section.

(c) The reserve source or sources of energy need not supply independent HF and MF radio installations at the same time. The reserve source or sources of energy must be independent of the propelling power of the ship and the ship's electrical system.

(d) Where, in addition to the VHF radio installation, two or more of the other radio installations, referred to in paragraph (b) of this section, can be connected to the reserve source or sources of energy, they must be capable of simultaneously supplying, for one hour, as specified in paragraph (b) of this section, the VHF radio installation and;

(1) all other radio installations which can be connected to the reserve source or sources of energy at the same time; or

(2) whichever of the other radio installations will consume the most power, if only one of the other radio installations can be connected to the reserve source or sources of energy at the same time as the VHF radio installation.

(e) The reserve source, or sources, of energy may be used to supply the electrical lighting required by § 80.1083(b)(4) of this part.

(f) Where a reserve source of energy consists of a rechargeable accumulator battery or batteries:

(1) a means of automatically charging such batteries must be provided which must be capable of recharging them to minimum capacity requirements within 10 hours; and

(2) the capacity of the battery or batteries must be checked, using an appropriate method, at intervals not exceeding 12 months when the ship is not at sea.

(g) The accumulator batteries which provide a reserve source of energy must be installed to ensure: the highest degree of service, a reasonable lifetime, reasonable safety; that the battery temperatures remain within the manufacturer's specifications whether under charge or idle; and that when fully charged, the batteries will provide at least the minimum required hours of operation under all weather conditions.

(h) If an uninterrupted input of information from the ship's navigational or other equipment to a radio installation required by this subpart is needed to ensure its proper performance, means must be provided to ensure the continuous supply of such information in the event of failure of the ship's main or emergency source of electrical power.

§ 80.1101 Performance standards

(a) All equipment specified in this subpart must meet the general requirements for shipboard equipment as set out in IMO Resolution A.569(14) entitled "General requirements for shipboard radio equipment forming part of the future global maritime distress and safety system" which is incorporated by reference.

(b) The equipment specified in this subpart must also conform to the appropriate performance standards listed below which are incorporated by reference.

(1) *NAVTEX receivers* : IMO Resolution A.525(13) and CCIR Recommendation 540.

(2) *VHF radio equipment* : IMO Resolution A.609(15) and CCIR Recommendation 493.

(3) *MF radio equipment* : IMO Resolution A.610(15) and CCIR Recommendation 493.

(4) *MF/HF radio equipment*: IMO Resolution A.613(15) and CCIR Recommendations 493 and 625.

(5) *406 MHz EPIRB*: IMO Resolution A.611(15); IMO MSC 55/25, annex 6; and CCIR Recommendation 633.

(6) *VHF 156.525 MHz EPIRB*: IMO Resolution A.612(15); IMO MSC 55/25, annex 6; and CCIR Recommendation 493.

(7) *9 GHz radar transponder*: IMO Resolution A.604(15) and CCIR Recommendation 628.

(8) *Two-way VHF radiotelephone*: IMO Resolution A.605(15).

(9) *INMARSAT-A SES*: IMO Resolution A.608(15) and CCIR Recommendation 493.

(10) *INMARSAT-C SES*: IMO MSC 55/25, annex 4 and CCIR Recommendation 493.

(11) *INMARSAT EGC*: IMO MSC 55/25, annex 5.

(12) *INMARSAT L-band EPIRB*: IMO MSC 55/25, annex 6 and 7; and CCIR Recommendation 632.

§ 80.1103 Equipment authorization

(a) All equipment specified in § 80.1101(b) of this part must be type accepted in accordance with Part 2 of the Commission's Rules, except equipment used in the INMARSAT space segment. Equipment intended for use in the INMARSAT space segment must be type-approved by INMARSAT and notified in accordance with Part 2 of the Commission's Rules. The technical parameters of the equipment must conform to the performance standards as specified in § 80.1101 of this part.

(b) Applicants for type acceptance must submit with their application measurement data sufficiently complete to ensure compliance with the technical parameters. The application must include the items listed in § 2.983 of the Commission's Rules. Additional measurement data or information may be requested depending upon the equipment. For items not listed in § 2.983 of the Commission's Rules, the applicant must attest that the equipment complies with performance standards as specified in § 80.1101 and, where applicable, that measurements have been made that demonstrate the necessary compliance. Submission of representative data demonstrating compliance is not required unless requested by the Commission.

(c) Applicants for notification must attest that the equipment complies with performance standards as specified in § 80.1101 and, where applicable, that measurements have been made that demonstrate the necessary compliance. Submission of representative data demonstrating compliance is not required unless requested by the Commission. The application must include the items listed in § 2.975 of this chapter and a copy of the INMARSAT type-approval certificate for the specific unit under review.

(d) Submission of a sample unit is not required unless specifically requested by the Commission.

§ 80.1105 Maintenance requirements

(a) Equipment must be so designed that the main units can be replaced readily, without elaborate recalibration or readjustment. Where applicable, equipment must be constructed and installed so that it is readily accessible for inspection and on-board maintenance purposes. Adequate information must be provided to enable the equipment to be properly operated and maintained (see IMO Resolution A.569(14)). Adequate tools and spares must be provided to enable the equipment to be maintained.

(b) Radio equipment required by this subpart must be maintained to provide the availability of the functional requirements specified in § 80.1081 of this part and to meet the performance standards specified in § 80.1101 of this part.

(c) On ships engaged on voyages in sea areas A1 and A2, the availability must be ensured by duplication of equipment, shore-based maintenance, or at-sea electronic maintenance capability, or a combination of these.

(d) On ships engaged on voyages in sea areas A3 and A4, the availability must be ensured by using a combination of at least two of the following methods: duplication of equipment, shore-based maintenance, or at-sea electronic maintenance capability.

(e) The malfunction of equipment providing general radiocommunications as required by § 80.1081(a)(8) of this part will not be considered as rendering a ship unseaworthy or as a reason for delaying the ship in ports where repair facilities are not readily available, provided the ship is capable of performing all distress and safety functions specified in § 80.1081 of this part.

OPERATING PROCEDURES FOR DISTRESS AND SAFETY COMMUNICATIONS

§ 80.1109 Distress, urgency, and safety communications

(a) Distress traffic consists of all messages relating to the immediate assistance required by the ship in distress, including search and rescue communications and on-scene communications. The distress traffic must as far as possible be on the frequencies contained in § 80.1077 of this part.

(b) Urgency and safety communications include: navigational and meteorological warnings and urgent information; ship-to-ship safety navigation communications; ship reporting communications; support communications for search and rescue operations; other urgency and safety messages and communications relating to the navigation, movements and needs of ships and weather observation messages destined for an official meteorological service.

(c) Intership navigation safety communications are those VHF radiotelephone communications conducted between ships for the purpose of contributing to the safe movement of ships. The frequency 156.650 MHz is used for intership navigation safety communications (see § 80.1077 of this part).

§ 80.1111 Distress alerting

(a) The transmission of a distress alert indicates that a mobile unit or person is in distress and requires immediate assistance. The distress alert is a digital selective call using a distress call format in bands used for terrestrial radiocommunication or a distress message format, which is relayed through space stations.

(b) The distress alert must be sent through a satellite either with absolute priority in general communication channels or on exclusive distress and safety frequencies or, alternatively, on the distress and safety frequencies in the MF, HF, and VHF bands using digital selective calling.

(c) The distress alert must be sent only on the authority of the person responsible for the ship, aircraft or other vehicle carrying the mobile station or the mobile earth station.

(d) All stations which receive a distress alert transmitted by digital selective calling must immediately cease any transmission capable of interfering with distress traffic and must continue watch until the call has been acknowledged.

§ 80.1113 Transmission of a distress alert

(a) The distress alert must identify the station in distress and its position. The distress alert may also contain information regarding the nature of the distress, the type of assistance required, the course and speed of the mobile unit, the time that this information was recorded and any other information which might facilitate rescue.

(b) The format of distress calls and distress messages must be in accordance with CCIR Recommendation 493 as specified in § 80.1101 of this part.

(c) Ship-to-shore distress alerts are used to alert Rescue Coordination Centers via coast stations or coast earth stations that a ship is in distress. These alerts are based on the use of transmissions via satellites (from a ship earth station or a satellite EPIRB) and terrestrial services (from ship stations and EPIRBs).

(d) Ship-to-ship distress alerts are used to alert other ships in the vicinity of the ship in distress and are based on the use of digital selective calling in the VHF, MF, and HF bands.

(e) Shore-to-ship distress alert relays are used by a station or Rescue Coordination Center to relay information about a ship in distress to, as appropriate, all ships, a selected group of ships, or a specific ship by satellite and/or terrestrial means. The distress alert relay must contain the identification of the mobile unit in distress, its position and all other information which might facilitate rescue.

§ 80.1115 Transmission of a distress alert by a station not itself in distress

(a) A station in the mobile or mobile-satellite service which learns that a mobile unit is in distress must initiate and transmit a distress alert relay in any of the following cases:

(1) when the mobile unit in distress is not itself in a position to transmit the distress alert; or

(2) when the master or person responsible for the mobile unit not in distress or the person responsible for the land station determines that further help is necessary.

(b) A station transmitting a distress alert relay in accordance with paragraph (a) of this section or § 80.1121(c) of this part must indicate that it is not itself in distress.

§ 80.1117 Procedure for receipt and acknowledgement of distress alerts

(a) Acknowledgement by digital selective calling of receipt of a distress alert in the terrestrial services must comply with CCIR Recommendation 541, which is incorporated by reference.

(b) Acknowledgement through a satellite of receipt of a distress alert from a ship earth station must be sent immediately (see § 80.1119 of this part).

(c) Acknowledgement by radiotelephony of receipt of a distress alert from a ship station or a ship earth station must be given in the following form:

(1) the distress signal MAYDAY;

(2) the call sign or other identification of the station sending the distress message, spoken three times;

(3) the words THIS IS (or DE spoken as DELTA ECHO in case of language difficulties);

(4) the call sign or other identification of the station acknowledging receipt, spoken three times;

(5) the word RECEIVED (or RRR spoken as ROMEO ROMEO ROMEO in case of language difficulties);

(6) the distress signal MAYDAY.

(d) The acknowledgement by direct-printing telegraphy of receipt of a distress alert from a ship station must be given in the following form:

(1) the distress signal MAYDAY;

(2) the call sign or other identification of the station sending the distress alert;

(3) the word DE;

(4) the call sign or other identification of the station acknowledging receipt of the distress alert;

(5) the signal RRR;

(6) the distress signal MAYDAY.

(e) The acknowledgement by direct-printing telegraphy of receipt of a distress alert from a ship earth station must be given by the coast earth station receiving the distress alert by retransmitting the ship station identity of the ship transmitting the distress alert.

§ 80.1119 Receipt and acknowledgement of distress alerts by coast stations and coast earth stations

(a) Coast stations that receive a distress alert should defer acknowledgement for a short interval so that receipt may be acknowledged by a Rescue Coordination Center. Where an acknowledgement is not forthcoming within 3 minutes, the coast station in receipt of distress alerts must ensure that they are routed to a Rescue Coordination Center as soon as possible. Coast stations must provide assistance for distress communications when requested to do so by the U.S. Coast Guard.

(b) Coast earth stations in receipt of distress alerts must ensure that they are routed as soon as possible to a Rescue Coordination Center. Coast earth stations must relay, as soon as possible, an acknowlegement of a distress alert from a Rescue Coordination Center. No charge is to be made for distress alerts, urgency, and safety messages, or related traffic that is preceded by the signals: MAYDAY, PAN PAN, or SECURITE.

§ 80.1121 Receipt and acknowledgement of distress alerts by ship stations and ship earth stations

(a) Ship or ship earth stations that receive a distress alert must, as soon as possible, inform the master or person responsible for the ship of the contents of the distress alert.

(b) In areas where reliable communications with one or more coast stations are practicable, ship stations in receipt of a distress alert should defer acknowledgement for a short interval so that receipt may be acknowledged by a coast station.

(c) Ship stations operating in areas where reliable communications with a coast station are not practicable that receive a distress alert from a ship station which is, beyond doubt, in their vicinity, must, as soon as possible and if appropriately equipped, acknowledge receipt and inform a Rescue Coordination Center through a coast station or coast earth station (see § 80.1115(a)(2) of this part). However, a ship station receiving an HF distress alert must not acknowledge it but must observe the requirements of § 80.1123 of this part, and must, if the alert is not acknowledged by a coast station within 3 minutes, relay the distress alert.

(d) A ship station acknowledging receipt of a distress alert in accordance with paragraphs (b) or (c) of this section should:

(1) in the first instance, acknowledge receipt of the alert by using radiotelephony on the distress and safety traffic frequency in the band used for the alert;

(2) if acknowledgement by radiotelephony of the distress alert received on the MF or VHF distress alerting frequency is unsuccessful, acknowledge receipt of the distress alert by responding with a digital selective call on the appropriate frequency.

(e) A ship station in receipt of a shore-to-ship distress alert relay (see § 80.1113(e) of this part) should establish communication as directed and render such assistance as required and appropriate.

§ 80.1123 Watch requirements for ship stations

(a) While at sea, all ships must maintain a continuous watch:

(1) on VHF DSC channel 70, if the ship is fitted with a VHF radio installation in accordance with § 80.1085(a)(2) of this part;

(2) on the distress and safety DSC frequency 2187.5 kHz, if the ship is fitted with an MF radio installation in accordance with §§ 80.1089(a)(2) or 80.1091(a)(3) of this part;

(3) on the distress and safety DSC frequencies 2187.5 kHz and 8414.5 kHz also on at least one of the distress and safety DSC frequencies 4207.5 kHz, 6312 kHz, 12577 kHz, or 16804.5 kHz appropriate to the time of day and the geographical position of the ship, if the ship is fitted with an MF/HF radio installation in accordance with §§ 80.1091(a)(2)(ii) or 80.1093(a) of this part (this watch may be kept by means of a scanning receiver); and

(4) for satellite shore-to-ship distress alerts, if the ship is fitted with an INMARSAT ship earth station in accordance with § 80.1091(a)(1) of this part.

(b) While at sea, all ships must maintain a radio watch for broadcasts of maritime safety information on the appropriate frequency or frequencies on which such information is broadcast for the area in which the ship is navigating.

(c) Until February 1, 1999, every ship while at sea must maintain, when practicable, a continuous listening watch on VHF Channel 16. This watch must be kept at the position from which the ship is normally navigated.

(d) Until February 1, 1999, every ship required to carry a radiotelephone watch receiver must maintain, while at sea, a continuous watch the radiotelephone distress frequency 2182 kHz. This watch must be kept at the position from which the ship is normally navigated.

(e) On receipt of a distress alert transmitted by use of digital selective calling techniques, ship stations must set watch on the radiotelephone distress and safety traffic frequency associated with the distress and safety calling frequency on which the distress alert was received.

(f) Ship stations with narrow-band direct printing equipment must set watch on the narrow-band direct-printing frequency associated with the distress alert signal if it indicates that narrow-band direct-printing is to be used for subsequent distress communications. If practicable, they should additionally set watch on the radiotelephone frequency associated with the distress alert frequency.

§ 80.1125 Search and rescue coordinating communications

(a) The distress signal consists of the word MAYDAY, pronounced in radiotelephony as the French expression <m'aider>. For distress traffic by radiotelephony, when establishing communications, calls must be prefixed by the distress signal MAYDAY.

(b) Error correction techniques, in accordance with CCIR Recommendation 625 as specified in § 80.1101 of this part, must be used for distress traffic by direct-printing telegraphy. All messages must be preceded by at least one carriage return, a line feed signal, a letter shift signal and the distress signal MAYDAY.

(c) Distress communications by direct-printing telegraphy should normally be established by the ship in distress and should be in the broadcast (forward error correction) mode. The ARQ mode may subsequently be used when it is advantageous to do so.

(d) The Rescue Coordination Center responsible for controlling a search and rescue operation must also coordinate the distress traffic relating to the incident or may appoint another station to do so.

(e) The Rescue Coordination Center coordinating distress traffic, the unit coordinating search and rescue operations, or the coast station involved may impose silence on stations which interfere with that traffic. This instruction may be addressed to all stations or to one station only, according to circumstances. In either case, the following must be used:

(1) in radiotelephony, the signal SEELONCE MAYDAY, pronounced as the French expression <silence, m'aider>;

(2) in narrow-band direct-printing telegraphy normally using forward-error correcting mode, the signal SILENCE MAYDAY. However, the ARQ mode may be used when it is advantageous to do so.

(f) Until they receive the message indicating that normal working may be resumed (see paragraph (h) of this section), all stations which are aware of the distress traffic, and which are not taking part in it, and which are not in distress, are forbidden to transmit on the frequencies in which the distress traffic is taking place.

(g) Stations following distress traffic that are able to continue normal service may do so when the distress traffic is well established and on condition that it observes the provisions of paragraph (f) of this section and that it does not interfere with distress traffic.

(h) When distress traffic has ceased on frequencies which have been used for distress traffic, the Rescue Coordination Center controlling a search and rescue operation must initiate a message for transmission on these frequencies indicating that distress traffic has finished.

(i) In radiotelephony, the message referred to in paragraph (h) of this section consists of:

(1) the distress signal MAYDAY;

(2) the call "Hello all stations" or CQ (spoken as CHARLIE QUEBEC) spoken three times;

(3) the words THIS IS (or DE spoken as DELTA ECHO in the case of language difficulties);

(4) the call sign or other identification of the station sending the message;

(5) the time of handing in of the message;

(6) the name and call sign of the mobile station which was in distress;

(7) the words SEELONCE FEENEE pronounced as the French words <silence fini>.

(j) In direct-printing telegraphy, the message referred to in paragraph (h) of this section consists of:

(1) the distress signal MAYDAY;

(2) the call CQ;

(3) the word DE;

(4) the call sign or other identification of the station sending the message;

(5) the time of handing in of the message;

(6) the name and call sign of the mobile station which was in distress; and

(7) the words SILENCE FINI.

§ 80.1127 On-scene communications

(a) On-scene communications are those between the mobile unit in distress and assisting mobile units, and between the mobile units and the unit coordinating search and rescue operations.

(b) Control of on-scene communications is the responsibility of the unit coordinating search and rescue operations. Simplex communications must be used so that all on-scene mobile stations may share relevant information concerning the distress incident. If direct-printing telegraphy is used, it must be in the forward error-correcting mode in accordance with CCIR Recommendation 625 as specified in § 80.1101 of this part.

(c) The preferred frequencies in radiotelephony for on-scene communications are 156.8 MHz and 2182 kHz. The frequency 2174.5 kHz may also be used for ship-to-ship on-scene communications using narrow-band direct-printing telegraphy in the forward error correcting mode in accordance with CCIR Recommendation 625 as specified in § 80.1101 of this part.

(d) In addition to 156.8 MHz and 2182 kHz, the frequencies 3023 kHz, 4125 kHz, 5680 kHz, 123.1 MHz and 156.3 MHz may be used for ship-to-aircraft on-scene communications.

(e) The selection or designation of on-scene frequencies is the responsibility of the unit coordinating search and rescue operations. Normally, once an on-scene frequency is established, a continuous aural or teleprinter watch is maintained by all participating on-scene mobile units on the selected frequency.

§ 80.1129 Locating and homing signals

(a) Locating signals are radio transmissions intended to facilitate the finding of a mobile unit in distress or the location of survivors. These signals include those transmitted by searching units and those transmitted by the mobile unit in distress, by survival craft, by float-free EPIRBS, by satellite EPRIBs, and by search and rescue radar transponders to assist the searching units.

(b) Homing signals are those locating signals which are transmitted by mobile units in distress, or by survival craft, for the purpose of providing searching units with a signal that can be used to determine the bearing to the transmitting stations.

(c) Locating signals may be transmitted in the following frequency bands: 117.975-136 MHz, 156-174 MHz, 406-406.1 MHz, and 9200-9500 MHz.

(d) The 9 GHz locating signals must be in accordance with CCIR Recommendation 628 as specified in § 80.1101 of this part.

§ 80.1131 Transmissions of urgency communications

(a) In a terrestrial system the announcement of the urgency message must be made on one or more of the distress and safety calling frequencies specified in § 80.1077 of this part using digital selective calling and the urgency call format. A separate announcement need not be made if the urgency message is to be transmitted through the maritime mobile-satellite service.

(b) The urgency signal and message must be transmitted on one or more of the distress and safety traffic frequencies specified in § 80.1077 of this part, or via the maritime mobile-satellite service or on other frequencies used for this purpose.

(c) The urgency signal consists of the words PAN PAN. In radiotelephony each word of the group must be pronounced as the French word "panne".

(d) The urgency call format and the urgency signal indicate that the calling station has a very urgent message to transmit concerning the safety of a mobile unit or a person.

(e) In radiotelephony, the urgency message must be preceded by the urgency signal, repeated three times, and the identification of the transmitting station.

(f) In narrow-band direct-printing, the urgency message must be preceded by the urgency signal and the identification of the transmitting station.

(g) The urgency call format or urgency signal must be sent only on the authority of the master or the person responsible for the mobile unit carrying the mobile station or mobile earth station.

(h) The urgency call format or the urgency signal may be transmitted by a land station or a coast earth station with the approval of the responsible authority.

(i) When an urgency message which calls for action by the stations receiving the message has been transmitted, the station responsible for its transmission must cancel it as soon as it knows that action is no longer necessary.

(j) Error correction techniques, in accordance with CCIR Recommendation 625 as specified in § 80.1101 of this part, must be used for urgency messages by direct-printing telegraphy. All messages must be preceded by at least one carriage return, a line feed signal, a letter shift signal and the urgency signal PAN PAN.

(k) Urgency communications by direct-printing telegraphy should normally be established in the broadcast (forward error correction) mode. The ARQ mode may subsequently be used when it is advantageous to do so.

§ 80.1133 Transmission of safety communications

(a) In a terrestrial system the announcement of the safety message must be made on one or more of the distress and safety calling frequencies specified in § 80.1077 of this part using digital selective calling techniques. A separate announcement need not be made if the message is to be transmitted through the maritime mobile-satellite service.

(b) The safety signal and message must normally be transmitted on one or more of the distress and safety traffic frequencies specified in § 80.1077 of this part, or via the maritime mobile satellite service or an other frequencies used for this purpose.

(c) The safety signal consists of the word SECURITE. In radiotelephony, it is pronounced as in French.

(d) The safety call format or the safety signal indicates that the calling station has an important navigational or meteorological warning to transmit.

(e) In radiotelephony, the safety message must be preceded by the safety signal, repeated three times, and the identification of the transmitting station.

(f) In narrow-band direct-printing, the safety message must be preceded by the safety signal and the identification of the transmitting station.

(g) Error correction techniques, in accordance with CCIR Recommendation 625 as specified in § 80.1101 of this part, must be used for safety messages by direct-printing telegraphy. All messages must be preceded by at least one carriage return, a line feed signal, a letter shift signal and the safety signal SECURITE.

(h) Safety communications by direct-printing telegraphy should normally be established in the broadcast (forward error correction) mode. The ARQ mode may subsequently be used when it is advantageous to do so.

§ 80.1135 Transmission of maritime safety information

(a) The operational details of the stations transmitting maritime safety information in accordance with this section are indicated in the ITU List of Radiodetermination and Special Service Stations.

(b) The mode and format of the transmissions mentioned in this section is in accordance with the CCIR Recommendation 540 as specified in § 80.1101 of this part.

(c) Maritime safety information is transmitted by means of narrow-band direct-printing telegraphy with forward error correction using the frequency 518 kHz in accordance with the international NAVTEX system (see § 80.1077 of this part).

(d) The frequency 490 kHz may be used, after full implementation of the GMDSS, for the transmission of maritime safety information by means of narrow-band direct-printing telegraphy with forward error correction (see § 80.1077 of this part).

(e) Internationally, the frequency 4209.5 kHz is used for NAVTEX-type transmission by means of narrow-band direct-printing telegraphy with forward error correction (see § 80.1077 of this part).

(f) Maritime safety information is transmitted by means of narrow-band direct-printing telegraphy with forward error correction using the frequencies 4210 kHz, 6314 kHz, 8416.5 kHz, 12579 kHz, 16806.5 kHz, 19680.5, 22376 kHz, and 26100.5 kHz (see § 80.1077 of this part).

(g) Maritime safety information is transmitted via satellite in the maritime mobile-satellite service using the band 1530-1545 MHz (see § 80.1077 of this part).

FOOTNOTES

[1] Because of the magnitude of the revisions to the Radio Regulations adopted by the 1987 Mobile WARC, we are implementing the changes to the Commission's Rules in three proceedings. The first proceeding addressed changes to the Table of Frequency Allocations and certain maritime requirements that entered into force on October 3, 1989. *See* Report and Order, GEN Docket No. 89-103, 4 FCC Rcd 7603 (1989). The second proceeding addressed those revisions that pertained to the maritime mobile HF bands between 4000-27500 kHz. *See* Notice of Proposed Rule Making, PR Docket No. 90-133, 5 FCC Rcd 1838 (1990). This, the final proceeding in this series, will focus on those changes necessary to implement the GMDSS in the maritime mobile service rules.

[2] The 1987 Mobile WARC completed the revisions started at the WARC on Mobile Services held in 1983 regarding the implementation of the GMDSS into the international Radio Regulations.

[3] The United States delegation, along with 23 other nations, made protocol statements taking reservations on Articles 55 and 56 because the revisions enacted mandatory requirements for radio electronics personnel to be on-board vessels. *See* Statement Nos. 17, 51, and 52, Final Protocol of Final Acts of 1987 Mobile WARC (MOB-87). This issue is discussed in detail below.

[4] Sea areas A1 and A2 have been established along portions of the European coast. The U.S. Coast Guard has plans to establish an area A1 and, at least a partial A2 area, within United States waters. They also plan to install a trial operational MF/HF DSC system at the Boston communications station in 1991, and if successful, at one or two Pacific locations in 1992.

[5] COSPAS-SARSAT is a combined Russian-English acronym for a joint international satellite-based search and rescue system established by Canada, France, USSR, and the United States to locate emergency radiobeacons transmitting on 121.5 MHz and 406 MHz. The U.S. built satellites in this system operate on 243 MHz also. (COSPAS is the acronym for the Russian equivalent of Space System for Search of Distress Vessels and SARSAT is the acronym for Search and Rescue Satellite-Aided Tracking.)

[6] Footprint means the area of effective signal reception at the local user terminal from the satellite as it rises above the horizon until it sets when sufficient information is available to enable the position of the EPIRB to be calculated.

[7] The INMARSAT system includes a feature that allows the possibility of calling only a particular ship or group of ships. This feature permits messages to be sent to certain ships, rather than all ships within signal range.

[8] The GMDSS provisions allow ships that continue the manual watch on VHF Channel 16 to defer fitting the automated Channel 70 encoder and watch receiver until February 1, 1997. We do not propose to incorporate this option into the Commission's Rules. This option is not in keeping with U.S. objectives because it promotes the aural watch requirement rather than the early implementation of automation.

[9] Currently, both the INMARSAT-A and INMARSAT-C (previously called Standard-A and Standard-C) ship earth stations have been approved for use by the GMDSS. The INMARSAT-B ship earth station, using modern digital modulation technology, is currently under development.

[10] Survival craft is a craft capable of sustaining the lives of persons in distress from the time of abandoning the ship, such as lifeboats or liferafts.

[11] Type acceptance and notification are procedures by which the Commission issues equipment authorizations. *See* 47 C.F.R. § 2.901. For type acceptance, the applicant makes measurements and submits to the Commission certain representations and test

data that demonstrate compliance with the technical standards. For notification, the applicant makes measurements and attests that the measurements demonstrate compliance with the technical standards. Test data is not submitted unless specifically requested by the Commission. In both cases, an identification (FCC ID) number is issued by the Commission.

[12] INMARSAT equipment currently in use, such as the INMARSAT-A ship earth station, might not meet the performance standards adopted by IMO and CCIR although type-approved by INMARSAT. Under the proposed rules, the equipment must be tested by the manufacturer for conformance with the IMO and CCIR standards and notified by the Commission that it is approved for use. Compulsory ships that equip with INMARSAT equipment under the GMDSS must use equipment that has FCC ID numbers, which indicates compliance with IMO and CCIR performance standards. Voluntary ships may continue to use existing ship earth stations but without assurance that they meet GMDSS standards.

[13] Although Channel 16 has a manual watch, this requirement is not onerous because it is used for the dual purpose of both general calling and safety calling. As such, ships listening on Channel 16 for general communications receive distress alerts without maintaining a separate VHF watch. During the transition period, this watch, although manual, is essential to maintaining maritime safety while both distress and safety systems are operating.

[14] These watches are necessary to maintain the present distress and safety system in effect during the transition period. Further, these frequencies most likely will continue to be used by smaller non-GMDSS vessels, such as recreational and fishing vessels, for some time. Although we are not proposing that ships other than compulsory ships be required to equip with the new GMDSS equipment, we do encourage the owners of other ships, and particularly new owners or those that sail on extensive trips, to consider voluntarily fitting their vessels with approved GMDSS radio equipment. For example, the smaller INMARSAT-C ship earth station would enhance safety by giving access to the GMDSS for a minimal cost. IMO estimates that the current cost of installing an INMARSAT-C ship earth station to be $5,000.

[15] A public coast station may receive distress alerts on Channel 70 because it is used for both general calling and distress alerting.

[16] The IMO is currently developing provisional funding arrangements for GMDSS communications.

[17] *See Final Acts of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, on the Global Maritime Distress and Safety System*, Regulation IV/15.6, adopted November 9, 1988.

[18] Because most U.S. ships are expected to sail in sea area A3, the amendments to the Radio Regulations adopted by the 1987 Mobile WARC would require the majority of U.S. ships to carry personnel holding First or Second Class Radio Electronics Certificates.

[19] Articles 55 and 56 have been included on the agenda of the 1992 World Administrative Radio Conference (WARC-92). Over the next several months, the United States and other countries will explore proposals that would align the Radio Regulations with the Final Acts of the 1988 IMO Conference. *See Notice of Inquiry*, GEN Docket No. 89-554, 4 FCC Rcd 8546 (1989).

[20] We request comments on whether T-1 or T-2 radio operators that have a 6 month endorsement may be grandfathered or whether they must take the examination. If grandfathering is acceptable, for what period of time should it be permitted?

[21] Duplication of equipment means that compulsory ships would need to be equipped with certain equipment critical to distress communications rather than a complete second set of all equipment required under the GMDSS system. The IMO is developing further guidance on the maintenance options.

[22] The proposed rules for the GMDSS are set forth in a separate subpart, Subpart W, in the Appendix. Because it is our intention to have a "self-contained" subpart in the Rules solely devoted to the GMDSS during the transition period, the maritime rules (47 C.F.R. Part 80) will have redundant sections for many requirements, such as ship carriage requirements, technical standards, and equipment authorization. Where a requirement is not specifically denoted in the proposed Subpart W, then the existing requirements would continue. For example, neither the IMO or CCIR performance standards proposed for incorporation by reference specify a limit for spurious emissions of transmitters. Thus, the existing requirement listed in 47 C.F.R. § 80.211 (Subpart E, General Technical Requirements) would govern and transmitters used in the GMDSS must be in compliance before type-acceptance is issued. In cases where a new requirement is specified in the Subpart W, such as a sample unit is not required to be submitted for type-acceptance, the proposed rules would supersede existing requirements for GMDSS equipment only.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-535

In Re Applications of

VERNON R. BALDWIN & BILLY W. LANHAM d/b/a TRI-STATE COMMUNICATIONS — File No. BPH-870331PD

BROADSTAR COMMUNICATIONS, INC., DEBTOR-IN-POSSESSION — File No. BPH-870408KD

For Construction Permit for a New FM Station, Channel 282A, at Harrison, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1990; Released: October 23, 1990

By the Commission:

1. Before the Commission is an Application for Review of Review Board Decision and Motion for Partial Summary Decision filed by BroadStar Communications, Inc., Debtor-in-Possession (BroadStar), on February 28, 1990, and related pleadings.[1] The pleadings relate to the Review Board's *Decision* denying BroadStar's application and granting the competing application of Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications (Tri-State). *Tri-State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989), recon. denied, 5 FCC Rcd 534 (Rev. Bd. 1990). We will affirm the Review Board's decision.

I. BACKGROUND

2. Of the nine original mutually exclusive applicants in this proceeding only two remain. On March 13, 1989, the ALJ granted a motion to enlarge and designated a financial qualification issue against BroadStar. FCC 89M-766. On May 19, 1989, the ALJ accepted BroadStar's amendment withdrawing its reliance on the loan commitment letter that served as its primary financial showing and committing itself to obtain new financing. FCC 89M-1487. On May 25, 1989, before offering any new financial showing, BroadStar and JACI, a wholly-owned affiliate, filed petitions for bankruptcy under Chapter 11 of the Bankruptcy Code, and Earnest L. James, BroadStar's 100 percent shareholder, filed under Chapter 7 of the Bankruptcy Code.

3. On August 21, 1989, BroadStar exchanged its hearing exhibits in which it proposed to meet its financial requirements of $340,000 by forming a new corporation (NewStar) in which Earnest L. James would be the sole voting shareholder, and to which Minority Broadcast Investment Corporation would lend $400,000. BroadStar proposed to seek its removal from the bankruptcy proceeding and to transfer its application to Newstar. Tri-State filed a motion for summary decision to resolve the financial qualification issue against BroadStar. The ALJ found that BroadStar had failed to establish that it was financially qualified. The proposal to lend money to NewStar, which could not be substituted as the applicant in this proceeding until approval was obtained from both the bankruptcy court and the Commission, did not establish the financial qualifications of BroadStar. Thus, the ALJ granted Tri-State's motion. *Tri-State Communications*, 4 FCC Rcd 6708, 6709 ¶ 10 (Admin. LJ 1989). Because no qualification issues had been designated against Tri-State, the ALJ granted its application. *Id.* at 6709 ¶ 12.

4. The Review Board affirmed the ALJ's decision because the Bankruptcy Court had not approved BroadStar's proposed transfer arrangement, nor had BroadStar submitted a petition to substitute NewStar as the applicant in this proceeding. *Tri-State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989). Broadstar filed a petition for reconsideration based on an order of the Bankruptcy Court approving its reorganization plan. This petition was subsequently denied by the Board because further approval was required from the creditors and the Bankruptcy Court and no petition had been filed to substitute NewStar as the applicant. *Tri-State Communications*, 5 FCC Rcd 534 (Rev. Bd. 1990).

5. BroadStar asserts that it now has the bankruptcy court's approval to transfer its application to NewStar. Therefore, BroadStar requests the Commission to allow it to amend its application, substitute NewStar as the applicant, grant a summary decision resolving the financial qualification issue in favor of NewStar, and remand this proceeding for a full comparative hearing.

II. DISCUSSION

6. BroadStar's pleadings are cast in terms of the ordinary good cause requirements for accepting an amendment during the course of a hearing.[2] However, once the record is closed, a public interest in preserving finality arises. Although the interest in preserving finality must be weighed against the interest to be served by further litigation, it is proper for the Commission to apply a more exacting standard in considering pleadings calling for further proceedings. *See Omaha TV 15, Inc.*, 4 FCC Rcd 730 ¶ 5 (1988), citing *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964). Moreover, the fact that reopening the record would prejudice other parties who prosecuted their applications in a proper manner is a significant consideration. *See Cuban-American Limited*, 5 FCC Rcd 3781, 3783 ¶ 18 (1990).

7. In this case, the Board correctly held that BroadStar was not "ready, willing and able" to proceed with the hearing and that it merely claimed "that it *might*, at some unspecified future date, be in a position to *become* financially qualified." *Tri- State Communications*, 4 FCC Rcd at 8259 ¶ 10 (emphasis in original). Although BroadStar claims that it now has a viable financial proposal, the Commission cannot hold its proceedings open indefinitely for applicants to bring themselves into compliance with basic qualification requirements at the expense of timely initiation of service to the public. *See Cuban-American Limited*, 5 FCC Rcd at 3783 ¶ 18. Accepting BroadStar's

financial amendment and remanding to the ALJ for a comparative hearing at this late stage of the proceeding would prejudice Tri-State and, more importantly, substantially delay the authorization of new service to the public. In view of these circumstances, we find that BroadStar fails to meet the more exacting standards applied to post-record pleadings calling for further proceedings. *See Omaha TV 15, Inc.*, 4 FCC Rcd at 730 ¶ 5. [3]

8. BroadStar contends that the Commission has liberally accepted amendments which would remove a disqualification issue, including a financial disqualification issue, especially where the denial of the amendment would result in there being only one applicant remaining in the proceeding. *See Bison City Television 49 Limited Partnership*, 91 FCC 2d 26, 29 (Rev. Bd. 1982). *Bison City* is inapposite to the facts of this case. *Bison City* involved a question of whether the ALJ erred in rejecting an amendment during the course of the evidentiary proceedings, whereas BroadStar did not proffer its amendment, in a form that could be acted upon by the Commission, until long after the record was closed and after the Board had completed its *de novo* review responsibilities.

9. BroadStar also maintains that the Commission has previously granted applicants leave to amend their financial showings after an initial decision and as a part of their applications for review, as BroadStar seeks to do in this case. *See Lewel Broadcasting, Inc.*, 86 FCC 2d 896 (1981) and *Gilbert Broadcast Corp.*, 91 FCC 2d 450 (1982). These cases are not of assistance to BroadStar in this instance. The acceptance of a post-hearing amendment in *Lewel* required no further proceedings and the amendment served the public interest by facilitating the prompt initiation of broadcast service. Similarly, in *Gilbert*, the acceptance of the amendment created no need for further proceedings. In contrast, even assuming that no further proceedings were required with respect to BroadStar's new financial proposal, the relief BroadStar requests would entail a remand for full comparative hearing on the applicants' comparative qualifications and thus a substantial delay in the authorization of the proposed new service for Harrison, Ohio.

10. Broadstar also argues that the Commission's policy of cooperating with the bankruptcy courts mandates acceptance of its financial amendment. As support for its argument it cites the Commission's action in *Second Thursday Corp.*, 22 FCC 2d 515 (1970). BroadStar also cites *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974), for the proposition that agencies, including the FCC, should be alert to minimize conflict between their policies and other federal policies. BroadStar's reliance on these cases is misplaced. These cases relate to a specific Commission policy designed to allow the sale of assets of broadcast licensees or permittees in bankruptcy proceedings for the benefit of innocent creditors. BroadStar, in this proceeding, is neither a licensee nor a permittee possessing assets which could be used for the benefit of innocent creditors. By filing an application in this proceeding, BroadStar has only a potential interest, speculative at best, in obtaining such an authorization. BroadStar has offered no justification for extending the public policy considerations underlying the cases cited above to this proceeding.

11. We therefore hold that BroadStar has made no showing that would warrant further proceedings, and that the public interest will be best served by our resolution of this case on the basis of the present record.

III. ORDERS

12. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend and Motion for Partial Summary Decision filed by BroadStar Communications, Inc. Debtor-in-Possession on February 28, 1990 ARE DENIED.

13. IT IS FURTHER ORDERED, That the Motion for Leave to Supplement "Opposition to Broadstar Communications, Inc., Debtor-in-Possession Petition for Leave to Amend" filed by Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications on August 15, 1990 IS DISMISSED, as moot.

14. IT IS FURTHER ORDERED, That the Motion to Strike Application for Review filed by Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications on March 5, 1990 IS DISMISSED, as moot.

15. IT IS FURTHER ORDERED, That the Motion to Strike Petition for Leave to Amend filed by Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications on March 5, 1990 IS DISMISSED, as moot.

16. IT IS FURTHER ORDERED, That the Petition for Leave to File Reply to Opposition to Application for Review by BroadStar Communications, Inc. Debter-in Possession on March 16, 1990 IS DENIED.[4]

17. IT IS FURTHER ORDERED, That the Motion to Strike "BroadStar Communications, Inc., Debtor-in Possession Reply to Opposition for Petition for Leave to Amend" filed by Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications on March 21, 1990 and the Motion for Expedited Consideration filed by Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications on May 24, 1990 ARE DISMISSED, as moot.

18. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed on February 28, 1990 by Earnest L. James d/b/a BroadStar Communications, Inc., Debtor-in Possession IS DENIED; that the application of BroadStar Communications, Inc., Debtor-in Possession (File No. BPH-870408KD) IS DENIED; that the application of Vernon R. Baldwin and Billy W. Lanham d/b/a Tri-State Communications (File No. BPH-870331PD) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Additional pleadings filed in this proceeding are: (a) Petition for Leave to Amend filed by BroadStar on February 28, 1990; (b) Motions to Strike Application for Review and Petition for Leave to Amend filed by Tri-State on March 5, 1990; (c) Oppositions to Application for Review and Petition for Leave to Amend filed by Tri-State on March 7, 1990; (d) Consolidated Opposition to Motions to Strike filed by BroadStar on March 8, 1990; (e) Petition for Leave to File and Reply to Opposition to Application for Review and Reply to Opposition to Petition for Leave to Amend filed by BroadStar on March 16, 1990; (f) Motion to Strike Reply to Opposition to Petition for Leave to Amend filed by Tri-State on March 21, 1990; (g) Opposition to Petition for Leave to File Reply to Opposition to Application for

Review filed by Tri-State on March 21, 1990; (h) Motion for Expedited Consideration filed by Tri-State on May 24, 1990; (i) Motion for Leave to Supplement Opposition filed by Tri-State on August 15, 1990; and (j) Opposition filed by BroadStar on August 24, 1990.

[2] *See* 47 C.F.R. § 73.3522(b). The test for good cause is usually set forth as follows: The amendment (1) was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage. *See e.g. Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970); *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 29 (Rev. Bd. 1982).

[3] Our ruling here is further supported by the greater emphasis the Commission has placed on its responsibility to provide service to the public in the most efficient manner possible and to achieve an expeditious point of finality. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). The Commission has recognized that "temporizing with flawed proposals" has "inordinately delayed" the initiation of new service in the past, and that this delay disserved the public interest. *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985).

[4] Replies to Oppositions to Applications for Review are accepted only if requested by the Commission. No such request was made in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-240

In re Applications of

ALBERT E. GARY	File No. BPH-851029MH
KILLINGTON BROADCASTING, LTD.	File No. BPH-851030MN
MOUNTAIN BROADCASTING LIMITED PARTNERS	File No. BPH-851030MP
ELF BROADCASTING COMPANY	File No. BPH-851030MQ

For Construction Permit for
New FM Station, Channel 287C2,
Killington, Vermont

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1990; Released: October 23, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In an *Initial Decision*, 5 FCC Rcd 323 (1990) (I.D.), presiding Administrative Law Judge Richard L. Sippel (ALJ) granted the application of Killington Broadcasting, Ltd. (KBL) for a new FM broadcast station at Killington, Vermont. The proceeding is now before the Review Board on exceptions. One of the competing applicants, Elf Broadcasting Company (Elf) whose application was denied on financial grounds, contends that the ALJ erred in denying its petitions to enlarge issues seeking the addition of financial certification and financial qualifications issues against KBL (Br. 34-38), and the other two applicants (Br. 38-42). As indicated below, we remand the case for further consideration of these issues.

2. KBL is a limited partnership with a sole general partner, Daniel W. Ewald, who has a 20% equity position in KBL, and a sole limited partner, Walter J. Sczudlo, an 80% equity owner. I.D., para. 46; KBL Exh. 1 at 1. In KBL's application, as originally filed on October 30, 1985, Ewald certified to KBL's financial qualifications. Ewald believed he had reasonable assurance of $500,000 funds availability, based on his conversations with, and a $500,000 loan letter (dated October 29, 1985), from Roderick K. Phillips, Assistant Vice President of the Marble Bank, Killington, Vermont. *See* Elf Exh. 10; Tr. 334-338. The Marble Bank letter provides:

> This letter states the conditions under which this Bank may provide a loan to Killington Broadcasting, Ltd. in order to construct an FM radio station. This letter is not to be construed as a loan commitment, but is issued to give the Federal Communications Commission assurance that the Bank may be willing to make a term loan in the amount of [redacted amount] to Killington Broadcasting, Ltd. in order to construct an FM radio station if the the following conditions apply at the time of the loan application:
>
> (a) the applicant presents a permit for the construction of a radio station;
>
> (b) there has been no material adverse change, in the Bank's sole judgment, of the applicant's financial condition;
>
> (c) the applicant is maintaining a satisfactory Banking relationship with us; and
>
> (d) any other criteria which the Marble Bank deems appropriate in evaluating any proposed loan.

Elf Exh. 10. Ewald testified at hearing that, prior to preparation of the letter by Phillips, he had spoken with Phillips and "had a list of things that [he] wanted [Phillips] to put in the letter if [Phillips] could at all do it, some of which got in and some of which didn't." Tr. 335.

3. Ewald was questioned about the bank's knowledge of his personal financial situation, as follows (Tr. 336):

> [Elf Counsel]: Now did you provide the bank background financial information about yourself?
>
> [Ewald]: The bank already [had] background financial information about me at the time they wrote this letter.
>
> [Elf Counsel]: What information did they have?
>
> [Ewald]: Well, I am involved in a number of real estate -- I was involved in a real -- not a number -- I was involved in a real estate, I have alluded to it, I called it Three Mountain View Estates. It was a 27-acre development in Rutland, Vermont with nine three-acre plots on which homes had been built. I sold the land. I actually built the spec house. In the course of developing this property, I had been into the bank, I had made -- the bank had an application and a financial statement from me on record in relation to my activities at Three Mountain View Estates.

Elf counsel then inquired of Ewald whether he had indicated to the bank that he would personally guarantee repayment of the loan, but KBL counsel's objection to the question was properly sustained by the ALJ. Finances were not then in issue. Tr. 336-337. Ewald further testified that the loan letter was not predicated on any financial information concerning the limited partner, Sczudlo. Tr. 337-338.

4. In its exceptions, Elf points out that the bank letter fails to indicate the anticipated interest rate, terms of repayment, and collateral for the loan. Elf Br. at 35. Elf also argues that the letter does not evince a present, firm intention to make a loan, but expresses only a mere

willingness to consider making a loan. *Id.* at 34-35. Elf concludes that the bank letter is "nothing more than a mere last-minute accommodation to facilitate the KBL filing," *id.* at 37 (footnote omitted), and asserts therefore that the ALJ should have granted its enlargement request for financial certification and financial qualifications issues.

5. KBL replies that:

> [O]n the merits, there is no basis for remand. KBL's general partner obtained its bank letter for $500,000, based on his own creditworthiness and prior banking relationship with the Marble Bank. Indeed, that bank had on file Mr. Ewald's financial statement and a loan application he prepared in the course of developing a 27-acre tract of land in Rutland, Vermont.

Reply at 8 (footnote omitted). KBL further offers that "[a]ny perceived deficiency with respect to the wording of KBL's bank letter can be easily removed by permitting the record to be supplemented." *Id.* at 9.

DISCUSSION

6. In *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989) the Commission held that:

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, *prior to certification*, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial net liquid assets on hand, *or committed sources of funds to construct and operate for three months without revenue* . . . .
>
> * * *
>
> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds.

7. After reviewing the relevant Commission authorities, the Board has indicated that, to establish reasonable assurance of committed source of funds from a lending institution, an applicant must show:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been primarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990).

8. Where an applicant has relied on a potential loan from a lending institution, the Commission has required that the bank have a "present firm intention to make [the] loan, future conditions permitting." *Merrimack Valley Broadcasting Inc.*, 82 FCC 2d 166, 167 (1980). At least since *Orange Nine, Inc.*, 7 FCC 2d 788, 793 (1967), the Commission has designated financial qualification issues to inquire about the "terms, conditions, and security required, if any, in connection with the proposed loan," and whether the proposed loan from a bank "will be available to the applicant and, if so, the terms, conditions, and collateral required in connection therewith."

9. From the 1960s until the adoption of the (now-abandoned) financial certification requirements, *Revision of Form 301*, 50 RR 2d 381 (1981), the Commission followed a liberal "policy of permitting an applicant to remove a disqualifying factor through amendment during hearing. *See Fisher Broadcasting Co.*, 30 FCC 177 (1961), and *Beacon Broadcasting Systems Inc.*, FCC 60-118, 19 RR 927 (1960)." *Azalea Corp.*, 31 FCC 2d 561, 563 (1971). Applicants were permitted to amend in response to petitions to add financial issues, *William R. Gaston*, 35 FCC 2d 615, 619 (Rev. Bd. 1972); many months after designation of a financial issue for hearing, *Click Broadcasting Co.*, 25 FCC 2d 511, 513 (Rev. Bd. 1972); on the eve of the hearing, *Bison City TV 49 L. P.*, 91 FCC 2d 26, 28-29 (Rev. Bd. 1982); and even after the hearing record was closed. *Gilbert Broadcasting Group*, 68 FCC 2d 186, 207-208 n.54 (Rev. Bd. 1978). This practice changed with the adoption of certification.

10. When the focus shifted from missing documentation and deficient technical terms, to the basic candor and substance behind the original certification, applicants were required to *first* establish that they were financially qualified at the time of certification. *See, e.g., Pepper Schultz*, 5 FCC Rcd 3273, para. 2 (1990). Initial financial qualifications thus became an important ingredient to a good cause showing for subsequent financial amendments. *See, e.g., Marlin Broadcasting of Central Florida, Inc.*, FCC 90-320, released October 4, 1990, at para. 6; *Pepper Schultz*, *supra* ; *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2843 (1990). Both *Northampton* and *Scioto* recognized that applicants must

demonstrate substantial compliance with the underlying "fundamental obligation to obtain reasonable assurance of funding" before financial certification. *Marlin Broadcasting, supra,* at para. 4, and note 6. *Scioto* again emphasized that an inquiry about the terms and conditions of a bank letter is not a mere formal exercise, but rather is designed to establish, at a bare minimum, that the lending institution has reviewed a broadcast applicant's financial needs and qualifications; that adequate collateral has been demonstrated; that the tentative terms of the loan have been specified; and that the institution has a present firm intent to make a loan, subject to future review. Finally, the Commission's recent *Marlin* decision noted that *Multi-State Communications, Inc. v. FCC* is a narrow exception to the general requirement that the specific collateral terms must be stated in the bank letter. There the lender was "personally and favorably acquainted with several of the [applicant's] stockholders" and the bank letter "expressed a specific willingness to make a loan and provided specific interest rate and repayment provisions." *Marlin, supra,* n.7.

11. Here, KBL appears to recognize that several basic terms are missing from the bank's letter: *e.g.,* repayment conditions, interest rate, and required collateral. Moreover, KBL's "self-serving," fragmentary and "uncorroborated" testimony discussed above, paras. 2-3, also gives rise to questions about its financial qualifications. KBL relies on Ewald's testimony concerning his discussion with the bank, but his testimony establishes that certain "things" that the applicant wanted included in the letter were not included. An inquiry about collateral, an essential term, was aborted, not improperly, by an objection from KBL's own counsel; and Ewald's self-serving and fragmentary testimony was not corroborated by the bank official. *See The Baltimore Radio Show, Inc.,* 4 FCC Rcd 6437, 6445 (Rev. Bd. 1989). The bank letter, on its face, and the surrounding circumstances raise substantial and material questions of fact about whether *any* understanding was in fact reached between the applicant and the bank which would establish that the bank had a firm present intent to make a loan, as opposed to a mere willingness to consider the matter in the future.

12. KBL did request an opportunity to supplement the record to fill in gaps and ambiguities to avoid a remand hearing. However, such an approach is inappropriate here because the record "on its face plainly raises material or substantial questions of fact so as to immediately require a formal remand." *Charisma Broadcasting Corp.,* 5 FCC Rcd 561 (Rev. Bd. 1990); *Shawn Phelan,* 5 FCC Rcd 53 (Rev. Bd. 1990). Accordingly, we will remand for a further hearing on the financial issues against KBL requested by Elf. As previously noted, Elf also sought the addition of financial issues against Albert E. Gary and Mountain Broadcasting Limited Partners. Enlargement of the issues was denied for procedural reasons and these two applicants did not have a full opportunity to respond. To ensure that a full and complete record is developed, *see Northampton, Scioto, and Marlin,* and that similarly situated applicants are not afforded disparate treatment, these two applicants will be afforded an opportunity to respond on the merits, before the ALJ decides whether the issues should be enlarged against either of the two applicants.

13. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for a further hearing and the preparation of a Supplemental Initial Decision on the following issues:

(1) To determine whether Killington Broadcasting, Ltd. falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee; and

(2) To determine whether Killington Broadcasting, Ltd. is financially qualified to be a Commission licensee.

14. IT IS FURTHER ORDERED, That the unopposed "Motion to Accept Supplement" filed on June 1, 1990 by Elf Broadcasting Company and the unopposed petitions for leave to amend filed June 1 and July 10, 1990 by Mountain Broadcasting Limited Partners ARE GRANTED, and the supplement and the amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

BOROUGH OF CLEARFIELD, PENNSYLVANIA	CSR-3290 PA0200

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1990; Released: October 22, 1990

By the Chief, Mass Media Bureau:

INTRODUCTION

1. On September 26, 1989,[1] the Borough of Clearfield, Pennsylvania (hereinafter "the Borough") filed a petition for special relief seeking a ruling, pursuant to §76.33(a) of the Commission's Rules, that the Borough's franchised cable television system is not subject to effective competition. The Borough's petition is opposed by Warner Cable Communications, Inc. (hereinafter "Warner"), the Borough's franchisee,[2] and the Borough has replied.

2. On October 30, 1984, the Cable Communications Policy Act was signed into law. [3] This legislation set forth a national policy concerning cable communications, to encourage cable's growth and development, to establish guidelines for the regulation of cable systems, to promote competition in cable communications, and to minimize unnecessary regulation.[4] In the *Cable Communications Act Rules*, 58 RR 2d 1 (1985), *modified*, 104 FCC 2d 386 (1986), *aff'd in part and remanded in part sub nom. ACLU v. FCC*, 823 F. 2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), *on remand*, 3 FCC Rcd 2617 (1988), the Commission adopted rules to implement provisions of the Cable Act. Among the rules adopted was §76.33, establishing standards for regulating cable television service rates. That rule states, in pertinent part:

> Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in §73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in §76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in §74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community.

47 C.F.R. §76.33(a)(2). Parties may challenge the availability of a signal, for purposes of this rule, through the Commission's special relief process. 47 C.F.R. §76.33(c). The rule applies to all cable systems as of October 29, 1988.

3. Television station contour maps on file with the Commission show that four television broadcast stations – Stations WTAJ-TV (CBS, Channel 10) and WKBS-TV (Ind., Channel 47), both Altoona, Pennsylvania; WPSX-TV (PBS, Channel 3), Clearfield, Pennsylvania; and WJAC-TV (NBC, Channel 6), Johnstown, Pennsylvania – place predicted Grade B contours over all of the community of Clearfield. Accordingly, the *prima facie* evidence indicates the presence of effective competition in Clearfield. It is this evidence that the Borough challenges in its petition.

SUMMARY OF PLEADINGS

4. In support of its petition, the Borough submits an engineering study, performed by Lawrence Behr Associates, Inc. (hereinafter "Behr"), of four stations: WTAJ-TV, WKBS-TV, WJAC-TV, and WATM-TV (ABC, Channel 23), Altoona, Pennsylvania. The Borough acknowledges that WPSX-TV provides Grade B service to all of Clearfield, and notes that Station WWCP-TV (Ind., Channel 8), Johnstown, Pennsylvania, was not included in the study as its predicted Grade B contour is even more distant from Clearfield than is WATM-TV's. In view of the Behr study, the Borough acknowledges that WJAC-TV also provides actual Grade B service to all of Clearfield. However, the Borough states that the Behr study also demonstrates that "no other television broadcast signal serves 100% of the Borough of Clearfield, published contour maps and significantly viewed stations list notwithstanding."[5] Accordingly, since only WPSX-TV and WJAC-TV provide actual Grade B service to Clearfield, the Borough argues that effective competition to Warner does not exist in Clearfield, and that Warner's basic service rates are subject to regulation by the Borough.

5. In opposition to the Borough, Warner states that the Commission has recognized the intent of the 1984 Cable Act to deregulate significantly cable television, citing *Cable Communications Act Rules*, *supra*, and that a presumption of the existence of effective competition is favored. Accordingly, in the present situation, the Borough must meet the burden of challenging the conceded *prima facie* evidence of effective competition. This, claims Warner, based on an engineering report by Malarkey-Taylor Associates (hereinafter "M-T Report"), which Warner submits, the Borough has not done. The engineering study submitted by the Borough, states Warner, fails to comport with the requirements of §73.686 of the Rules: a detailed description of calibrations is lacking, and additional cluster measurements (which are necessary if the strongest signal comes from a direction other than the transmitter) were not taken. In addition, contends Warner, the M-T Report demonstrates various discrepancies in the Behr study that "could result in a cumulative margin for error in the range of +2dB or more." However, the Behr study shows, with respect to WTAJ-TV, that 5 of 16 measured points

showed a Grade B signal or better, and 3 other points showed a signal strength within 1.5dB of Grade B quality. Given the margin for error found by the M-T Report, claims Warner, WTAJ-TV may in fact provide actual Grade B service to Clearfield, based on the Behr study. Accordingly, asserts Warner, the Borough has not proven the lack of effective competition to Warner.

6. In reply to Warner, the Borough argues that Warner has not refuted the Behr study, having submitted merely speculative arguments in criticism of it. The Borough disputes Warner's characterization of the intent underlying the Cable Act, and notes that in any event, the Borough has overcome any presumption of the existence of effective competition. The Borough contends that the Behr study was conducted in conformity with §73.686 of the Rules, and that Warner's speculative margin for error has no basis in fact or rule. The Borough also submits reply comments from Behr to the M-T Report. Behr notes that it has conducted similar studies in the past, none of which have been questioned or rejected by the Commission. Behr states that the measuring sites were properly chosen, and that its analysis methods are accurate, and were performed and interpreted so as to favor Warner's interests when questions arose. Behr notes that Warner was represented during the measurement process by its General Manager and by its Director of Engineering, and argues that the margin for error urged by the M-T Report is merely conjectural and unsupported. Finally, the Borough requests that it be reimbursed for "all its costs associated with this proceeding."

7. In a supplemental opposition, Warner argues that the 1984 Cable Act has empowered the Commission to establish standards for determining whether effective competition exists, and that the Commission's standards and conclusions favoring a presumption of the existence of competition have been upheld on appeal. Studies designed to counter this presumption, claims Warner, must be "methodologically sound . . . performed in strict accordance with §73.686 of the rules. . . ." The Behr study does not meet this strict standard, asserts Warner, and prior studies have no bearing on the validity of the submitted study. Studies must be performed accurately, maintains Warner, and the Commission, to be consistent, must account for a margin of error in engineering studies, just as it is required in significant viewing surveys, citing 47 C.F.R. §76.54(b). Contrary to the Borough's assertion, a margin of error must be considered in its entirety, states Warner.

8. In reply to Warner's supplemental opposition, the Borough reiterates that the Behr study has demonstrated that effective competition to Warner does not exist. Further, the Borough notes that at no time has Warner submitted a countervailing study, though Warner stated that it might do so if it were unable to conduct a survey of audience viewing.[6] The Borough states that, given that the Behr study took and analyzed measurements so as to give every advantage to Warner, no margin for error should be applied to the Behr study's figures.

DISCUSSION

9. Our rules for determining the presence of effective competition are simple and straightforward: the entire cable community must receive service from at least three unduplicated broadcast television signals. To be counted toward this three-signal complement, a signal must either be significantly viewed within the cable community, or place a predicted Grade B contour over the area in question. 47 C.F.R. §76.33(a)(2). At the same time, §76.33(a)(3) of the Rules allows for waivers of the criteria based upon a showing that actual Grade B service levels do (or do not) exist within the community. In the present case, no signals have been shown to be significantly viewed within the Borough of Clearfield.[7] Four stations, however, place predicted Grade B contours over the community: WTAJ-TV, WKBS-TV, WPSX-TV, and WJAC-TV. Both the Borough and Warner acknowledge that WPSX-TV and WJAC-TV provide actual Grade B service to the community. The question we must resolve, therefore, is whether or not any other station provides actual Grade B service to Clearfield.

10. Based upon the evidence before us, we find that effective competition to Warner does not exist in the Borough of Clearfield, Pennsylvania. Apart from WPSX-TV and WJAC-TV, no other television broadcast station provides actual Grade B service to Clearfield. While Warner alleges that the Behr study is deficient and that WTAJ-TV may also provide actual Grade B service, we find that the Behr study has been conducted in conformity with §73.686(c) of the Rules. This rule does not call for a 1.5dB margin of error in analyzing the results of such surveys, nor does it require the additional cluster measurements urged by Warner. The equipment used by Behr was calibrated at the manufacturer's just prior to its utilization, and a Malarkey-Taylor representative was present and accommodated during the Behr study, including cutting measured cable in his presence for examination. Warner's criticisms are simply unavailing.

11. As a final matter, we note that the Borough properly informed Warner of its intention to obtain an engineering study, and provided Warner an opportunity to negotiate a resolution, pursuant to §76.33(a)(3) of the Rules. In view of the result herein, the Borough is entitled to be reimbursed by Warner for the full cost of the September 20, 1989, Behr study. The Borough is not, however, entitled to reimbursement for any of its other costs associated with this proceeding. *See Cable Communications Act Rules*, 3 FCC Rcd at 2624-25.

12. In view of the foregoing, we find that Warner's rates for basic cable service are subject to regulation by the Borough, and that grant of the Borough's petition, to the extent indicated above, is in the public interest.

13. Accordingly, IT IS ORDERED, pursuant to §0.283 of the Commission's Rules, that the petition for special relief (CSR-3290), filed September 26, 1989, by the Borough of Clearfield, Pennsylvania, IS GRANTED to the extent indicated above, and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] The Borough had previously submitted a filing on August 4, 1989. Subsequently, however, it substituted for that filing the petition of September 26, 1989, accompanied by an updated engineering analysis, which was served on interested parties.

[2] Warner also sought and received an extension of time within which to oppose the Borough's petition. *Borough of Clearfield, PA*, Cable Television Actions Report No. 3253, Mimeo No. 852 (released December 7, 1989). *See also* note 6, *infra*.

[3] Pub. L. No. 98-549, §§1 *et seq.*, 98 Stat. 2779 (1984).

[4] 47 U.S.C. §521.

[5] WTAJ-TV, WJAC-TV, and WWCP-TV are significantly viewed in the *County* of Clearfield. However, no evidence concerning their viewership in the Borough of Clearfield has been submitted.

[6] Warner also requested an extension of time either to provide its own engineering measurements or to obtain a survey of station viewership in Clearfield, in order to establish the presence of three significantly viewed signals in Clearfield. This request was granted. *Borough of Clearfield, PA, supra*. However, on March 9, 1990, Warner reported that VideoProbeIndex, Inc. had "been unable to obtain agreements to participate from a sufficient number of non-cable households. . . ."

[7] For rate regulation purposes, the Commission requires the use of community-specific viewership data, rather than county-wide data, in determining significantly viewed status. *See City of Portola*, 4 FCC Rcd 1660, 1661 (1989); *Cable Communications Act Rules*, 3 FCC Rcd at 2619-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

PJB COMMUNICATIONS INC. OF VIRGINIA, INC. — File No. 63500-89-10-JSG

Notice of Apparent Liability for Forfeiture for failure to file notification of construction of Stations KPE333 and KPE335 in the Public Land Mobile Service at Northern Virginia

PJB COMMUNICATIONS, INC. — File No. 63500-89-11-JSG

Notice of Apparent Liability for Forfeiture for failure to file notification of construction of Station KPE333 in the Public Land Mobile Service at Maryland

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1990; Released: October 22, 1990

By the Chief, Mobile Services Division:

1. PJB Communications of Virginia, Inc., ("PJB of Virginia") and PJB Communications, Inc. ("PJB") have filed a "Consolidated Request for Remission or Reduction of Forfeiture" of two forfeitures totaling $8,000.00 imposed by the Mobile Services Division ("MSD") in the "Notices of Apparent Liability for Forfeiture" ("*NALF*s") which were issued on March 16, 1989.[1]

I. BACKGROUND

2. On December 16, 1988, PJB of Virginia filed a request for reinstatement of the authorizations of five of its one-way paging facilities operating on frequency 35.50 MHz for Stations KPE333 and KPE335 in Northern Virginia, and PJB filed a request for reinstatement of the authorizations of three of its one-way paging facilities on the same frequency for Station KPE333 in Maryland. PJB of Virginia and PJB constructed their respective facilities within the authorized construction period for each authorization and began operating the facilities. Both firms sought reinstatement because, for each station, PJB of Virginia and PJB failed to file FCC Form 489, notifying the Commission of completion of construction, as required by Section 22.9 of the Commission's Rules. The stations had been operating for six months to one year without the required notifications having being filed. On March 16, 1989, the MSD issued two *NALF* s, finding that an apparent violation of Section 22.9 had occurred for failure to timely file FCC Form 489 for the relevant stations. The MSD thus imposed a forfeiture of $5,000.00 in the *NALF to PJB of Virginia and imposed a forfeiture of $3,000.00 in the NALF* to PJB.

II. CONTENTIONS OF PJB OF VIRGINIA AND PJB

3. PJB of Virginia and PJB state that the failure to file the Forms 489 was discovered in early December 1988, during initial preparation of license renewal applications for all of the companies' paging stations. They assert that the authorizations inadvertently lapsed because both firms experienced serious economic difficulties and were undergoing financial reorganizations requiring the attention of the companies' principals. In addition, PJB of Virginia and PJB say the financial problems resulted in shorthanded staff, which contributed to the oversight.

4. PJB of Virginia and PJB argue that the violations did not cause harm to the public interest but actually benefited the public by allowing for continued provision of essential paging services. The companies assert that various factors warrant cancellation or at least a reduction in the forfeitures, citing *Tri-County Telephone Co.*, 54 Rad. Reg. 1065 (Com. Car. Bur. 1983) (" *Tri-County* "): (1) the violations were inadvertent; (2) they voluntarily disclosed the violations and took immediate remedial action; (3) they have no prior history of rules violations; and (4) imposition of the forfeitures would place an undue financial burden on each company, which could jeopardize their continued operations. The firms submit combined financial statements for the years ended April 30, 1988 and 1987, showing net losses of $1,008,146.00 and $511,271.00, respectively. They also submit a letter from Kaufman, Rosenbloom, Shapiro & Mostow, Certified Public Accountants ("CPA letter"), stating that the firms' total losses for the eight-month period ending December 31, 1988, are expected to increase by an additional $200,000.00. PJB of Virginia and PJB argue that in *Tri-County*, the proposed forfeiture was reduced where a net profit of $414.16 for the year was shown and, thus, their net losses in 1987 and 1988 make an even more compelling showing for cancellation or reduction of the forfeitures.

III. DISCUSSION

5. After carefully reviewing the facts and the assertions of PJB of Virginia and PJB, we decline to grant their requests for cancellation or reduction of the forfeitures. A licensee is responsible for complying with Commission rules and is responsible for its own acts or omissions. *See, e.g., Lorain Community Broadcasting Co.*, 18 FCC 2d 686 (1969). The fact that the violations might have been unintentional does not alter the fact that unauthorized operation existed and that the violations continued over a period of time and were repeated for each day the Forms 489 were not filed. Thus, the fact that the violations were inadvertent does not persuade us to cancel the forfeitures. Additionally, the nature, circumstances, extent, and gravity of the prohibited acts, as well as the firms' degree of culpability, and history of prior offenses, were already taken into account in setting the proposed forfeitures. *See* Section 503(b)(2)(B) of the Communications Act; *Delray Cellular Associates*, 4 FCC Rcd 2233 (1989).

6. We also find the economic-hardship arguments unavailing. The parties' gross revenues for 1987 and 1988 for PJB and PJB of Virginia are $23,573.00 and $395,469.00, respectively. Regarding the CPA letter, an assertion of expected losses without more is too general to support the parties' request for cancellation or remission. In the absence of any other mitigating financial circumstances and the level of gross revenues, we do not believe that PJB of Virginia and PJB have demonstrated that the forfeitures would result in financial hardship. Therefore, we conclude that cancellation or a remission of forfeiture has not been justified. Accordingly, we uphold both forfeitures, totaling $8,000.00.

IV. ORDERING PARAGRAPHS

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that PJB Communications of Virginia, Inc. FORFEIT to the United States the sum of Five Thousand Dollars ($5,000.00) and that PJB Communications FORFEIT to the United States the sum of Three Thousand Dollars ($3,000.00), for the violations of Section 22.9 of the Commission's Rules. Payment of the forfeitures may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

8. IT IS FURTHER ORDERED that if said forfeitures are not paid within the period specified, the cases will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

9. IT IS FURTHER ORDERED that a copy of this Order BE SENT to PJB Communications of Virginia, Inc. and to PJB Communications, Inc., Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobiles Services Division
Common Carrier Bureau

FOOTNOTE

[1] PJB of Virginia and PJB are affiliated companies with the same officers, directors, and shareholders. The facilities in question are part of the same integrated, one-way paging network owned and operated by both companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

RADIO RELAY CORP.-MICHIGAN — File No. 63500-89-16-BMW

Notice of Apparent Liability for failure to maintain tower of Station KQC884 in the Public Land Mobile Service at Novi, Michigan

ERRATUM

Released: October 24, 1990

By the Chief, Mobile Services Division:

The Memorandum Opinion and Order, DA 90-1406, released October 16, 1990, in the above-captioned matter is corrected to read as follows:

Paragraph 10. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that Radio Relay Corp.-Michigan FORFEIT to the United States the sum of Nine Thousand Nine Hundred Fifty Dollars ($9,950.00) for the violations of Section 22.109(1)(2) and (b) and Section 22.205(a)(1) and (b)(2) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 19209, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-460

In the Matter of

Amendment of Section 73.202(b), RM-7377
Table of Allotments,
FM Broadcast Stations.
(Van Buren, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed on behalf of LKR Communications, Inc. ("petitioner"), licensee of Station KLSZ-FM, Channel 272A, Van Buren, Arkansas, seeking the substitution of Channel 274C2 for Channel 272A, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 274C2 can be allotted to Van Buren at the petitioner's specified site located 17 kilometers (10.5 miles) south[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided Station KHOZ-FM, Channel 275C, Harrison, Arkansas, decreases its facilities to Class C1 standards in accordance with its construction permit (BPH-891017IC).[2]

3. We believe the proposal warrants consideration because it could provide Van Buren with an expanded coverage FM service. Therefore, we shall propose to substitute Channel 274C2 for Channel 272A at Van Buren, Arkansas. In accordance with established Commission policy, we will also propose to modify the Class A license of Station KLSZ-FM, as requested by the petitioner, in the event Channel 274C2 is substituted for Channel 272A at Van Buren, Arkansas. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 274C2 at Van Buren.

4. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Van Buren, Arkansas	272A	274C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frank R. Jazzo, Esq.
Robert D. Primosch, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Ave., NW
Suite 400
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's specified site are 35-17-55 and 94-25-26.

[2] Coordinates specified in the construction permit issued to Station KHOZ-FM at Harrison, Arkansas, are 36-26-11 and 93-14-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-461

In the Matter of

Amendment of Section 73.202(b), RM-7376
Table of Allotments,
FM Broadcast Stations.
(Gardnerville-Minden, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Carson Valley Radio, Inc. ("petitioner") requesting the substitution of Channel 256C3 for Channel 257A at Gardnerville-Minden, Nevada, and the modification of its license for Station KGVM to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 256C3 for Channel 257A at Gardnerville-Minden, Nevada, since it could enable Station KGVM to expand its coverage area. Channel 256C3 can be allotted to Gardnerville-Minden in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As requested, we also propose to modify petitioner's license for Station KGVM to specify operation on Channel 256C3 in lieu of its present Channel 257A. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the higher powered channel at Gardnerville-Minden or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Gardnerville-Minden, Nevada	257A	256C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Carson Valley Radio, Inc.
P.O. Box 2109
Minden, Nevada 89423
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations; interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 38-56-24 and West Longitude 119-45-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 18, 1990

ADDITIONAL STUDY TO DEMONSTRATE EFFECT ON AN AM CHANNEL BY THE MIGRATION OF A SINGLE STATION TO THE EXPANDED BAND (MM DOCKET 87-267)

The Mass Media Bureau has conducted an additional study in an effort to supplement certain data which were presented in the Commission's *Notice of Proposed Rule Making (NPRM)* (MM Docket No. 87-267). That *NPRM* addressed the review of the technical assignment criteria for the AM broadcast service.

The new study, shown below as Appendix 3A, is similar to Appendix 3 of the *NPRM* which used an individual station on a particular frequency to illustrate the effects of the expanded band migration process. Recognizing that such a study may not be representative of all cases, the new study was conducted to further demonstrate the benefits of the migration process. A different frequency and a new migration candidate were selected for this new study, which reveals a more substantial reduction of interference on the subject frequency than that indicated in the previous example in Appendix 3. It appears that the migration process could provide added interference reduction in the existing AM band since it is anticipated that more than one station on each channel would move to the expanded band once the process is fully implemented. This additional study may be helpful in developing comments in response to the *NPRM*. For further information on this matter, contact Henry A. Straube at (202) 254-3394.

- o -

APPENDIX 3A

Further Illustration of AM Interference Reduction Resulting from Migration of a Station from the Existing AM Band to the Expanded Portion of the AM Band.

The following table demonstrates the potential for improvement which could be achieved on an AM channel during nighttime hours by the movement of one station from a frequency within the existing AM band to one of the frequencies within the expanded band, 1605 kHz to 1705 kHz. The situation presented here describes a case where a single station's removal from a frequency would result in a significant improvement to numerous other operations. The frequency used for this study, 1430 kHz, was chosen because the number of stations operating on this channel permits a showing of significant impact a single station's moving to the expanded band could have on the stations remaining on the channel. The station selected, WXTZ, Indianapolis, Indiana was used because of its location relative to other stations and its predicted effect on a large number of these stations. The study was based on the new nighttime standards proposed in MM Docket No. 87-267: the nighttime formulas, the 0% RSS exclusion principle, and the adjacent channel protection ratio.

FEDERAL COMMUNICATIONS COMMISSION

Call	Location	Including WXTZ		Excluding WXTZ	
		Night Limit (mV/m)	Coverage (Sq.mi.)	Night Limit (mV/m)	Coverage (Sq.mi.)
KFNI	FRESNO,CA	5.81	824	5.76	830
KALI	SAN GABRIE,CA	26.04	144	26.04	144
KNTA	SANT CLARA,CA	24.54	41	24.53	41
KEZW	AURORA,CO	9.89	759	9.63	780
WOIR	HOMESTEAD,FL	16.23	74	15.76	77
WLKF	LAKELAND,FL	17.21	25	16.35	27
WLTG	PANAMA CIT,FL	23.72	204	22.41	234
WWGS	TIFTON,GA	38.85	14	37.75	14
WYMC	MAYFIELD,KY	28.95	17	21.20	25
WXKS	EVERETT,MA	43.02	9	43.00	9
WNAV	ANNAPOLIS,MD	28.82	83	28.60	84
WION	IONIA,MI	38.91	12	27.82	20
WBRB	MT CLEMENS,MI	29.86	41	21.40	68
WIL	ST LOUIS,MO	12.27	487	11.41	527
WDEX	MONROE,NC	34.41	25	32.05	27
WMNC	MORGANTON,NC	32.54	9	28.22	11
KRGI	GRAND ISLD,NE	19.62	117	18.82	124
WNJR	NEWARK,NJ	9.16	216	9.08	218
KCRX	ROSWELL,NM	16.49	110	16.48	110
WENE	ENDICOTT,NY	14.06	104	13.79	106
WFOB	FOSTORIA,OH	19.65	132	9.01	353
KALV	ALVA,OK	15.50	137	15.42	138
KQLL	TULSA,OK	10.96	679	10.86	686
KYKN	KEIZER,OR	14.40	112	14.39	112
WVAM	ALTOONA,PA	19.03	37	18.89	38
WNWZ	GERMANTOWN,TN	35.71	55	33.10	60
WHNK	MADISON,TN	33.29	17	21.95	29
KEES	GLADEWATER,TX	39.73	28	39.52	28
KLO	OGDEN,UT	5.17	1092	4.99	1127
KCLK	ASOTIN,WA	7.93	181	7.88	182
KBRC	MT VERNON,WA	13.32	65	13.31	65
WBEV	BEAVER DAM,WI	35.35	33	27.28	46
WEIR	WEIRTON,WV	10.45	75	9.87	80

NOTE: COVERAGE WAS BASED ON FCC FIGURE M-3 SOIL CONDUCTIVITY VALUES.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-177

In the Matter of

Amendment of Section 73.202(b), RM-7116
Table of Allotments,
FM Broadcast Stations.
(Susanville, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 2005 (1990), issued in response to a petition filed on behalf by Susan M. Ciborosky (petitioner), proposing the allotment of Channel 242C2 to Susanville, California, as that community's second local FM broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 242C2 to Susanville, since it could provide an additional local FM broadcast service to the community.

3. As indicated in the *Notice*, Channel 242C2 can be allotted to Susanville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 7.9 kilometers (4.9 miles) west of the community.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Susanville, California	227C, 242C2

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 242C2 at Susanville, California, will open on **December 11, 1990,** and close on **January 10, 1991.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 242C2 at Susanville are 40-26-55 and 120-44-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-463

In the Matter of

Amendment of Section 73.202(b), RM-7371
Table of Allotments,
FM Broadcast Stations.
(Coleraine, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for rule making is a petition filed by Lew Latto ("petitioner") requesting the allotment of Channel 241C1 to Coleraine, Minnesota, as that community's first FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration because it could provide a first FM broadcast service to Coleraine, Minnesota. Channel 241C1 can be allotted to Coleraine, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 8.6 kilometers (5.4 miles) north of the community.[1] The site restriction will avoid a short spacing to Station KKSR, Channel 241A, Sartell, Minnesota.[2] Since Coleraine is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the above, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Coleraine, Minnesota	----	241C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John J. McVeigh
Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street, Northwest
Suite 800
Washington, D.C. 20037-1125

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 241C1 are 47-21-24 and 93-25-47.

[2] The license for Station KKSR, Sartell, has been modified to specify operation on Channel 244C2 in lieu of Channel 241A (BPH-890627IE). Once Station KKSR is licensed on Channel 244C2, city reference coordinates could be used for Channel 241C1 at Coleraine.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-464

In the Matter of

Amendment of Section 73.202(b), RM-7470
Table of Allotments,
FM Broadcast Stations.
(Clarendon, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by John W. Lyle ("petitioner") requesting the allotment of Channel 295A to Clarendon, Pennsylvania, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 295A can be allotted to Clarendon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Clarendon is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 295A to Clarendon, Pennsylvania, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clarendon, Pennsylvania	--	295A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eric S. Kravetz, Esq.
Stephen E. Coran, Esq.
Brown Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 295A at Clarendon are North Latitude 41-46-48 and West Longitude 79-05-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-465

In the Matter of

Amendment of Section 73.202(b),	RM-7278
Table of Allotments,	
FM Broadcast Stations.	
(Chippewa Falls, Wisconsin)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Jay Lellman ("petitioner") seeking the allotment of Channel 260C3 to Chippewa Falls, Wisconsin, as that community's second FM broadcast service. Petitioner provided an engineering study in support of the proposal and indicated he would file an application for Channel 260C3.

2. We believe petitioner's proposal warrants consideration because the proposed allotment could provide a second FM broadcast service to Chippewa Falls, Wisconsin. Channel 260C3 can be allotted to Chippewa Falls in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction of 21 kilometers (13 miles) northwest of the community.[1] The site restriction will prevent a conflict with the license for Station KAUS-FM, Channel 260C1, Austin, Minnesota, the construction permit for Station WWIS-FM, Channel 259A, Black River Falls, Wisconsin, and a proposal to substitute Channel 259C3 for Channel 259A, at Black River Falls (MM Docket 89-308).

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Chippewa Falls, Wisconsin	288A	260C3, 288A

4. The Commission's authority to institute making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jay Lellman 902-1/2 Oxford Avenue Eau Claire, Wisconsin 54702 (Petitioner)	Larry G. Fuss Contemporary Communications Post Office Box 159 Fayetteville, Georgia 30214 (Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 260C3 are 45-06-56 and 91-28-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-559

In re Applications of

A. P. WALTER, JR. File No. BPH-870824MS

LADIES III BROADCASTING, INC. File No. BPH-870824MV

For Construction Permit for
New FM Station, Channel 286C,
Panama City, Florida

ORDER

Adopted: October 4, 1990; Released: October 22, 1990

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN not participating.

1. The Review Board has under consideration the "Motion for Extension of Time" filed October 3, 1990 by Ladies III Broadcasting, Inc. Movant requests twenty additional days to file the supplementary material called for by our *Memorandum Opinion and Order*, FCC 90R-82, released September 18, 1990. While movant asserts that the documentation requested is not in its "possession or control," it has not explained why twenty days is necessary to acquire control. Thus, we will grant only a ten-day extension (to and including October 19, 1990). [1]

ACCORDINGLY, IT IS ORDERED, That the "Motion for Extension of Time" filed October 3, 1990 by Ladies III Broadcasting, Inc. IS GRANTED in part, and the filing date IS EXTENDED to October 19, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] We have telephonically advised counsel of our ruling and are making pre-publication copies of this order available to them. Counsel for A. P. Walter, Jr. indicated that he would be filing an opposition to the motion. We find that this "ex parte disposition" of the extension request (47 CFR § 1.45(e)) will best serve the public interest. By reducing the extension period to merely 10 days, effective as of this date and without awaiting responsive pleadings, we hope to expedite our resolution of this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MCCAW CELLULAR COMMUNICATIONS, INC. File No. MSD-90-23

For a Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act of 1934

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1990; Released: October 24, 1990

By the Chief, Mobile Services Division:

1. McCaw Cellular Communications, Inc. (McCaw) requests a declaratory ruling that the appointment of Nicolas Kauser, a Canadian citizen, to the corporate office of Senior Vice President and Chief Technology Officer will not adversely affect the public interest.

2. McCaw is not itself a Commission licensee or permittee; however it owns or controls companies that are licensees or permittees in the cellular, paging, microwave, satellite and broadcasting services.

3. On August 7, 1990, the Commission issued a Public Notice, Report No. CL-90-268, regarding McCaw's request for a declaratory ruling and invited interested parties to file comments. No comments have been received.

4. Section 310(b)(4) of the Communications Act of 1934, as amended, provides that common carrier radio licenses shall not be granted to or held by:

> any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

The restrictions in Section 310(b)(4) reflect national security concerns and are designed to guard against foreign influence by limiting aliens' participation in certain domestic radio activities.[1] Nevertheless, it is within the Commission's discretion to allow a foreign national to serve as an officer of a parent corporation if such an appointment will not adversely affect the public interest.[2]

5. McCaw states that it wishes to appoint Mr. Kauser to the position of Senior Vice President and Chief Technology Officer because of his educational and professional credentials and his theoretical and practical knowledge of, and experience with, personal telecommunications and cellular technology. Mr. Kauser will principally be responsible for assisting in the development of McCaw's nationwide, seamless cellular network. His department will be charged with improving the dependability of cellular service and positioning the company for the introduction of digital technology. Mr. Kauser's technical and managerial experience is directly related to McCaw's current operations and future personal telecommunications endeavors. As Senior Vice President and Chief Technology Officer at McCaw, Mr. Kauser would have responsibilities including enhancing and expanding McCaw's service clusters, improving the dependability of cellular service, positioning the company for the introduction of digital technology, and establishing a world-class Technical Advisory Board.

6. McCaw submits that the desired appointment of Mr. Kauser as its Senior Vice President and Chief Technology Officer would not in any way threaten United States security interests or otherwise disserve the public interest. We agree. Mr. Kauser will not serve as an officer or director of any McCaw subsidiary and will not control any subsidiary's radio licenses or facilities. Mr. Kauser will be the only corporate officer who is not a United States citizen. While McCaw does hold a controlling interest in LIN Broadcasting Corporation (LIN), Mr. Kauser will not have any responsibilities, including advisory and non-operational responsibilities, with respect to any broadcast facilities licensed to LIN's subsidiaries. Mr. Kauser is being employed for McCaw's cellular and personal telecommunications operations which involve "passive" common carrier licensed facilities. Lastly, Mr. Kauser is from Canada, a nation which traditionally has had close and friendly relations with the United States.

7. In light of the facts presented to us, we do not find that Mr. Kauser's position as an officer of McCaw would warrant refusal or revocation of any authorization held by or applied for by its subsidiaries.

8. Accordingly, IT IS ORDERED that the request for declaratory ruling is GRANTED and the Commission would have no legal objection under Section 310(b)(4) of the Communications Act of 1934 to the appointment of Nicolas Kauser, a Canadian citizen, as a corporate officer of McCaw Cellular Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 F.C.C.2d 511, 516-517 (1985).

[2] *See* International Telephone and Telegraph Corp., 67 F.C.C. 2d 604 (1978) and Contel Corporation, 3 FCC Rcd 5795 (Dom. Fac. Div. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 18, 1990

HAMMETT & EDISON, INC. REQUEST FOR DECLATORY RULING CONCERNING DIRECTIONAL FM BROADCAST ANTENNAS

On September 20, 1989, the Commission received a request for declaratory ruling filed by Hammett & Edison, Inc. ("H&E"). concerning the definition of a directional FM broadcasting antenna. H&E notes that the current definition of a directional FM antenna given in Section 73.316(b) of the Commission's Rules, while appearing to be unambiguous, ignores the environment in which such an antenna must operate. H&E argues that the environment can produce extreme directional effects in an otherwise omnidirectional antenna. In support of this contention, H&E submits field patterns of omnidirectional antennas which are side-mounted on towers of various cross-sectional sizes and shapes. The patterns demonstrate significant omnidirectional pattern distortion. Accordingly, H&E requests that the Commission define more specifically what constitutes a directional FM antenna.

Comments on Hammett & Edison's request must be filed on or before November 19, 1990. Replies must be filed on or before December 3, 1990. Comments and reply comments submitted will be included in the record in MM Docket No. 87-121, where several petitions for reconsideration of action taken in the Report and Order in that proceeding currently are under consideration.

The full text of this document is available for viewing and copying in the Public Reference Room, Room 239, 1919 M St., N.W., Washington, D.C. Copies may also be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800.

For further information on this matter, contact Julie A. Pendergast at (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 27, 1990

COMMISSION REMINDS TELEVISION LICENSEES ABOUT OBLIGATIONS CONTAINED IN SECTION 73.1250(h) OF THE COMMISSION'S RULES REGARDING THE BROADCASTING OF EMERGENCY INFORMATION

The Commission has been advised that several television stations in the San Francisco, California, area broadcast emergency information about the earthquake on October 17, 1989, without visual displays or open captioning. Emergency broadcasts lacking visual displays deny deaf and hearing-impaired citizens access to vital information. We believe, therefore, it appropriate to remind licensees of their responsibilities during the broadcasting of information regarding emergency situations when such broadcasting is not being conducted under a national, state or local Emergency Broadcast System (EBS) plan. [Note: *See* Part 73 Subpart G (47 C.F.R. §§ 73.901 - 73.962) for corresponding responsibilities during operations conducted under an EBS plan.]

If a television station broadcasts any emergency information, that is, information which is of timely decisional value to the public in furthering the safety of life and property, it must present the information visually and may present it aurally as well. Stations may use any method of visual presentation which results in a legible message conveying the essential emergency information. Methods which may be used include, but are not necessarily limited to, electronic captioning, manual methods (hand printing), slides or mechanical printing processes. The use of sign language or symbols may be used to supplement, but not supplant, the other methods because not all persons with impaired hearing understand sign language.

The obligation to provide visual displays is incurred whenever emergency information is broadcast. *See* 47 C.F.R. § 73.1250(a) for examples of emergency situations. The obligation is not limited to those instances in which the EBS is formally activated, a request is received from a government official, or the information is specifically identified as an emergency announcement. Furthermore, the obligation cannot be avoided because the emergency information is broadcast during a regularly scheduled program or is characterized as news or public affairs. It is the act of transmitting emergency information that triggers the rule.

These requirements are designed to ensure that deaf and hearing impaired individuals receive emergency notification and instruction. The Commission, in this public notice, reminds broadcasters that failure to comply with Section 73.1250(h) may result in the imposition of administrative sanctions, including monetary forfeitures.

For further information contact Helene T. Schrier, (202) 632-3922.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, Inc. File No. BRCT-871221KE
Secaucus, New Jersey

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For Construction Permit for a New Television Station for Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1990; Released: October 18, 1990

By the Commission: Commissioner Duggan not participating.

1. Before the Commission are an Application for Review filed June 26, 1990 by Jean Wells as General Partner of Mainstream Television Limited Partnership (Mainstream) and an Opposition filed July 3, 1990 by WWOR-TV, Inc. (WWOR-TV).[1] These pleadings relate to a decision of the Review Board affirming, in part, the presiding ALJ's rulings on documents that Ms. Wells asserts are protected by either attorney-client privilege or the work product doctrine.

I. BACKGROUND

2. Jean Wells, the appellant herein, is the general partner of Garden State Broadcasting Limited Partnership. Ms. Wells was also the sole general partner in Mainstream Television Limited Partnership (Mainstream), which filed an opposition to the assignment of the same television channel that is before us in this case from RKO General, Inc. to GTH-101, now WWOR, Inc., the present licensee. Mainstream appealed the Commission's decision granting the assignment of the license from RKO to WWOR-TV to the U. S. Court of Appeals for the District of Columbia Circuit. Before the litigation was concluded and pursuant to a settlement agreement, RKO paid Mainstream $5,370,000 in return for Mainstream's dismissal of the appeal.

3. On December 21, 1987, WWOR-TV filed an application for renewal of its license and two days later, Garden State filed its competing application. These two applications are the subject of the proceedings in this case.

4. On October 25, 1988, the ALJ released an order granting WWOR-TV's Motion to Enlarge Issues and designated an abuse of process issue against Garden State. FCC 88M-3567.[2] On February 3, 1989, the ALJ issued a subpoena for documents requested by WWOR-TV relevant to the abuse of process issue. The documents now before us were submitted to the ALJ for *in camera* inspection pursuant to Garden State's claim that the documents were all subject to attorney-client privilege or work product doctrine. [3] The ALJ granted, in part, and denied, in part, the claims for protection. *WWOR - TV*, FCC 90M-1198, released May 15, 1990.

5. Upon appeal, the Board ruled that Ms. Wells based her appeal entirely on the work product doctrine and the Board did not address the issue of attorney-client privilege. In addition, the Board ruled that, as to those documents relating to the conception, preparation and prosecution of an application tendered to the FCC by Mainstream for the Channel 9 facilities then licensed to RKO General, "it would be difficult to presume that the licensee has not shown substantial need, even if the documents do reflect legal matters pertinent to appellant (and/or Mainstream)." *WWOR-TV*, 5 FCC Rcd 4113, 4114 ¶ 10 (Rev. Bd. 1990). However, the Board did not apply its ruling to any specific document because Ms. Wells had not submitted the documents at issue to the Board for *in camera* inspection.

6. As to the documents pertaining to a study performed by a consultant, Dr. Roger Johnson, retained by Mainstream to review the programming of RKO's WOR-TV, the Board stated, "Assuming, again without deciding (since we have not seen the documents at issue), that the subject material is covered by the 'work product' privilege (a claim [WWOR-TV] does not here frontally contest), we cannot see the 'substantial need' [for production], and nothing before us : . . persuades us otherwise." *Id.* at ¶ 11.

7. After reviewing the pleadings before us, we conclude that the Board erred in failing to rule fully on the merits of Ms. Wells' appeal.[4] In addition, the Board was plainly wrong in concluding that Ms. Wells did not argue that the attorney-client privilege was applicable to the documents in question. *See* Appeal at 3. Therefore, we will consider the merits of her substantive arguments.

II. APPLICATION FOR REVIEW

8. In her application for review, Ms. Wells argues that the Board erred by failing to address (1) her attorney-client privilege claim and (2) her claims that the ALJ's rulings are distorted by impermissable factual prejudgment that "must be reversed as arbitrary and capricious as part of the instant appeal proceeding." Application for Review at 1, 4-5.

9. WWOR-TV opposes the application for review claiming that (1) it is an unauthorized appeal,[5] *see* 47 C.F.R. § 1.115(e)(1); (2) the Board correctly addressed and ruled on the merits of the documents; and (3) the Board correctly declined to rule on Ms. Wells' claims of bias. Opposition at 3-5.

III. DISCUSSION

10. The attorney-client privilege and the work product doctrine are two distinct legal concepts. It is apparent that much of the confusion and contention that exists with respect to the documents before us is a result of the failure of the parties to properly distinguish between the two concepts.

11. The purpose of the attorney-client privilege is to protect confidential communications by a client to his or her lawyer for the purpose of obtaining legal advice. *See Georgia Public Telecommunications*, 5 FCC Rcd 4560 ¶ 5 (1990); *see also U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass 1950). The key elements of the attorney-client privilege are: (1) the existence of an attorney-client relationship; (2) a communication from the client to his or her attorney; (3) the communication is legally related; and, (4) there is an expectation of confidentiality. *See* MOORE'S FEDERAL PRACTICE ¶ 26.60[2]; *see also U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. at 358. The privilege also extends to communications from the attorney to the client, at least to the extent that such communications might tend to reveal confidential facts disclosed by the client. *Opal Chadwell*, 103 FCC 2d 840, 842 (Rev. Bd. 1986), *citing Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 389 (D. D.C. 1978).

12. The work product doctrine involves a different analysis. As relevant to this proceeding, it prohibits the discovery of documents prepared in anticipation of litigation or for trial by or for another party or that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). FRCP, Rule 26(b)(3). Nonetheless, the party seeking discovery may obtain the documents upon a showing that it has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *Id.* Even when a proper showing has been made, the presiding officer should protect against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

13. Having stated the general legal principles applicable to a determination of whether a document is entitled to protection under either the attorney-client privilege or work product doctrine, we now look at their application to the specific documents before us.

14. The ALJ organized his analysis into three categories: (1) transmittal letters; (2) correspondence in the regular course of business, including capital calls, partnership interests, assignments, tax advice from an accountant, apportionment of proceeds from the settlement fund, and fees for counsel and expert consultant ("business documents"); and (3) correspondence concerning and documents generated by and for Dr. Roger Johnson, Mainstream's and Garden State's expert on programming.

15. Ms. Wells argued before the Board that this classification ignored a whole category of documents relating to the conception, preparation and prosecution of Mainstream's application for Channel 9. Appeal at 2. In fact, the Board chose to break its categories into those documents pertaining to the conception, preparation and prosecution of Mainstream's application and those pertaining to Dr. Johnson's study. In our opinion, both approaches include all the documents, but the ALJ's provides a better framework for analyzing the two previously mentioned legal concepts and their exceptions.

A. Transmittal Letters

16. At least half of the documents before us are transmittal letters and in most instances they do not include the documents purportedly transmitted. They were appropriately described by the ALJ as follows:

> These letters serve for the most part to record in counsel's file the fact that important documents have been timely transmitted to the client and to tell the client to sign a document or review it for later discussion.

FCC 90M-1198 at ¶ 5. The ALJ ruled that because transmittal letters contain no facts submitted by the client to its attorney, they are not entitled to protection under the attorney-client privilege.[6] *Id.* at ¶ 4. We agree. Documents are not normally provided protection under the attorney-client privilege where the correspondence is based on information other than confidential information provided by the client and where disclosure would not reveal any confidential communications. *See Community Sav. & L Ass'n v. Federal Home Loan Bank Bd.*, 68 F.R.D. 378 (E.D. Wis. 1975). Moreover, we also agree that transmittal letters containing no facts, thoughts, opinions or theories of counsel or other representative of a party relating to pending litigation, are not protected by the work product doctrine. *See* FRCP Rule 26(b)(3).

17. The ALJ's holdings with respect to these matters are consistent with legal authority and Ms. Wells has offered no basis whatsoever, either general or specific, for protecting these documents under either the attorney-client privilege or the work product doctrine. In light of these facts and our review of each of the applicable documents, we will affirm the ALJ's rulings.[7]

B. Business Documents

18. Ms. Wells argues that the ALJ relied upon an "ill-defined" distinction between legal and business documents, according protection only to those documents of a purely legal nature without recognizing that "advice and assistance properly sought from an attorney cannot be narrowly limited to purely legal opinions." Application for Review at 3. Moreover, Ms. Wells argues that this is especially true in comparative proceedings where matters of a business nature may have legal significance.[8] *Id.* at 3, 4. The general legal standard in this area is that documents prepared in the regular course of business are not protected. *See United Shoe Machinery*, 89 F. Supp. at 359 as to attorney-client privilege); *U. S. v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982) (as to work product doctrine). Of special significance is the following:

> The work product is not an umbrella that shades all material prepared by a lawyer, however. The work product doctrine focuses only on material assembled and brought into being in anticipation of litigation. Excluded from work product materials, as the advisory committee notes to Rule 26(b)(3) make clear, are "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation. . . ." 48 F.R.D. at 501.

U.S. v. El Paso Co., at 542. Thus, documents, such as limited partnership agreements, for example, would clearly be excluded from protection under either of the legal concepts, absent specific demonstration that the document, or a significant portion thereof, invites or expresses a legal opinion or is at issue in the litigation. Ms. Wells has made no such contention, or any other argument that would protect any of the specific documents in this category. Therefore, we affirm the ALJ's rulings insofar as the specific documents he categorized as business documents are concerned, finding nothing in those rulings inconsistent with the authority cited therefor, and will require production of those documents.[9]

19. However, there is a group of documents relating to the preparation of a "statement" to be obtained from a bank and submitted to the Commission with the Mainstream application that does not belong within the category of business documents. Because the correspondence and documents related to a statement that would serve as a significant element of Mainstream's demonstration that it was financially qualified to operate the station it applied for, the documents are covered by the work product doctrine.[10] It is clear that Mainstream's application was intended to be mutually exclusive with RKO's application and therefore the application and all supporting documents could be reasonably considered to have been prepared in anticipation of litigation.

20. WWOR-TV argued before the Board that even in those situations where the work product doctrine might be applicable, it could demonstrate substantial need for production. It claimed that it had substantial need for all the documents requested because "the commonality of the law firm and general partner for Garden State and its predecessor in interest, Mainstream," were the basis, in part, for the designation of the abuse of process issue. Opposition to Appeal filed May 29, 1990. As to the bank letters, we hold that WWOR-TV has not met its burden of demonstrating substantial need and will protect documents enumerated as 20-1, 20-2, 21-1, 21-2 in their entirety, and, as to 22-1, redact paragraph two and require production of all else. The statement discussed in those documents, in final form, was filed with Garden State's application and WWOR-TV has offered no showing of substantial need relating to the abuse of process issue that would justify overcoming Garden State's claim of protection under the work product doctrine with regard to these documents.

C. Dr. Roger Johnson

21. The final category of documents we address relates to correspondence and documents concerning a study of RKO's programming performed by Dr. Roger Johnson. Of the 22 documents submitted for *in camera* review relating to the work of Dr. Johnson, all but six have been disposed of by our rulings on the other two categories. Five of the remaining documents relate to the scope of Dr. Johnson's study and the nature of his employment.[11] Even though such documents often entail an element of counsel's strategy, the courts have regularly denied documents protection that discuss the terms and conditions of employment or the employment purpose. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977; en banc 1978); *see also In re LTV Securities Litigation*, 89 F.R.D. 225 (ND Tex. 1981).[12] The one remaining document contains Dr. Johnson's observations and conclusions as a consultant for the purposes of the RKO litigation.[13] In our opinion, this is the type of document the work product doctrine was clearly intended to protect. As to WWOR-TV's alleged showing of substantial need, we agree with the Board that WWOR-TV has failed to show the relevance of any information relating to the study of RKO's programming to the abuse of process issue. 5 FCC Rcd at 4114 ¶ 11. The study is a matter of public record and if Dr. Johnson were to use any document relating to the preparation of the RKO study in his testimony in this hearing to refresh his recollection, WWOR-TV would be entitled to review such document at that time for the purpose of cross-examination. We therefore find document 49-1 to 49-4 protected from disclosure under the work product doctrine.

22. The last matter for consideration is Ms. Wells' claim that the ALJ's rulings were distorted by impermissible factual prejudgment that "must be reversed as arbitrary and capricious as part of the instant appeal proceeding." Application for Review at 4. We disagree. As Ms. Wells admitted in her pleading, her claims of bias are not based on conduct traditionally viewed as being subject to interlocutory review under Section 1.245 of the Commission's Rules.[14] Rather, she argues that the ALJ, in making his discovery rulings with respect to the documents now before us, relied upon arbitrary and capricious factual prejudgments. As examples, she notes that the ALJ described Mainstream's counsel as the "manager" of Mainstream's affairs and treated Mainstream and Garden State as the same entity. Application for Review at 4. In our review of the ALJ's rulings on the documents before us, we have found no evidence of impropriety nor did we find any instance where such a characterization had any dispositive effect on the rulings in question. Ms. Wells has failed to establish that the ALJ's decisions regarding the documents before him were based upon anything other than his own reasonable application of the law pertaining to attorney-client privilege and the work product doctrine.

23. ACCORDINGLY, IT IS ORDERED, That the Motion for Stay filed by Jean Wells on June 26, 1990 IS DISMISSED as moot.

24. IT IS FURTHER ORDERED, That the Joint Motion to Expedite Review of Jean Wells' Application for Review and Motion to Stay filed August 20, 1990, filed by WWOR-TV, Inc. and Jean Wells IS GRANTED, and the Motion to Expedite Review of Jean Wells Application for Review and Motion to Stay filed August 9, 1990 by WWOR-TV, Inc. IS DISMISSED as moot.

25. IT IS FURTHER ORDERED, That the Application for Review filed June 26, 1990 by Jean Wells IS GRANTED to the extent indicated herein, and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On June 26, 1990 Jean Wells also filed a Motion for Stay and on July 3, 1990 WWOR-TV filed an opposition to the motion. Because the ALJ has stayed the production order while the matter is pending before the Commission, Wells' Motion for Stay may be dismissed as moot. Also before the Commission are a Motion to Expedite Review of Jean Wells' Application for Review and Motion to Stay filed August 9, 1990 by WWOR-TV and a Joint Motion to Expedite Review of Jean Wells' Application for Review and Motion to Stay filed August 20, 1990 by WWOR-TV and Jean Wells.

[2] The issue designated was as follows: To determine the facts and circumstances of the motive and the *bona fides* of the filing of Garden State Broadcasting Limited Partnership's application, whether those facts and circumstances show that the application of Garden State Broadcasting Limited Partnership was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, thereby abusing the Commission's process, whether Garden State Broadcasting Limited Partnership has misrepresented or lacked candor in certifying that it did not file its application for an improper motive and lack of good faith, and the impact thereof on the basic qualifications of Garden State Broadcasting Limited Partnership to be a Commission licensee. *WWOR - TV*, FCC 88M-3567 at 8.

[3] Documents found to be protected by the ALJ under either legal theory were not submitted to us on review; neither were redacted portions of other documents deemed by the ALJ to be otherwise discoverable.

[4] Although the Board faults Ms. Wells for not submitting the individual documents to the Board for *in camera* inspection, it appears that the Board could have obtained the documents, if it deemed them necessary, either from the ALJ or directly from the appellant, by simply requesting them. Nonetheless, no useful purpose would be served, at this stage, by a remand to the Board for consideration of the specific documents in light of the additional delay it would entail.

[5] This argument will be summarily dismissed because the appeal of the ALJ's discovery rulings to the Board was filed as a matter of right pursuant to 47 C.F.R. § 1.301(a). *See WWOR - TV, Inc.*, 5 FCC Rcd 3768 (1990).

[6] The Board recites, apparently with approval, the ALJ's position on the inapplicability of the attorney-client privilege or the work product doctrine to transmittal letters. *See* 5 FCC Rcd at 4113 ¶ 3.

[7] The documents to be produced are those identified by Ms. Wells as follows: 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-12, 1-13, 1-14, 1-15, 3-1, 4-1, 9-1, 12-1, 14-1, 15-1, 16-1, 16-2, 18-1, 26-1, 27-1, 31-1, 32-1, 34-1, 37-1, 39-1 to 39-4, 40-1, 41-1, 43-1 to 43-2, 44-1, 45-1 to 45-2, 46-1 to 46-7, 47-1 to 47-3, 48-1, 58-1, 60-1, 64-1 to 64-11, 66-1 and 66-2.

[8] Ms. Wells also argues that the ALJ erred in limiting the work product doctrine to documents prepared by "counsel or counsel's assistant." Although Ms. Wells is technically correct that the ALJ made this statement and that Rule 26(b)(3) has broader application (*see* paragraph 12 above), our review of the documents has presented no instance where this distinction would be decisional.

[9] The applicable documents are: 2-1, 5-1, 7-1, 8-1, 10-1, 11-1, 13-1, 23-1, 24-1 to 24-2, 28-1, 29-1, 30-1, 33-1, 35-1 to 35-11, 36-1 to 36-6, 37-2 to 37-5, 38-1 to 38-2, 42-1 to 42-3, 46-8, 51-1, 52-1, 53-1, 54-1, 55-1, 57-1, 61-1 to 61-2, 61-3 to 61-20, 62-1 to 62-2, 63-1, 65-1 to 65-2, 67-1, 68-1, 72-1, 73-1 and 74-1 to 74-15.

[10] The letters referred to are: 20-1 and 20-2 -- drafts dated January 14, 1986 and March 18, 1986, prepared by Maryland National Bank for submission to FCC regarding Garden State's construction and initial operating funds; 21-1 and 21-2 -- from Mr. Cohen to Mr. Rynd dated March 4, 1986 regarding bank letter (20-1); and 22-1 -- from Mr. Cohen to bank transmitting a copy of the Garden State limited partnership agreement and requesting modification of draft letter (20-1).

[11] The documents are: 17-1 to 17-2, 19-1 to 19-2, 50-1 to 50-2, 56-1 to 56-2 and 59-1 to 59-2. Documents 17 and 59 are identical.

[12] The cases cited relate to attorney-client privilege, but we find them applicable under the circumstances of this case. The documents contain no facts, impressions, conclusions, opinions, or legal theories of the attorney or the consultant, and Ms. Wells has made no showing that would warrant a different result.

[13] Document 49-1 to 49-4 is a preliminary progress report from Dr. Johnson.

[14] 47 C.F.R. § 1.245 establishes the procedure for seeking disqualification of a presiding officer.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-466

In the Matter of

Amendment of Section 73.202(b), RM-7327
Table of Allotments,
FM Broadcast Stations.
(Hondo, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Radio Medina, Inc., (petitioner), permittee of Channel 253A, Hondo, Texas, the Commission considers herein a petition for rule making proposing the substitution of Channel 254C3 for Channel 253A at Hondo, and the modification of its construction permit for KRBH(FM) to specify operation on the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. The allotment of Channel 254C3 can be made in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Additionally, since the community is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government must be obtained for the proposal.

3. As requested, we shall propose to modify the construction permit at Hondo to specify operation on Channel 254C3 in lieu of Channel 253A in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require the petitioner to demonstrate the availability of an additional equivalent channel at Hondo.

4. In view of the fact that Hondo could receive a wide coverage area FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hondo, Texas	253A	254C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

A. Wray Fitch III
Gammon & Grange
1925 K Street, N.W.
Suite 300
Washington, D.C. 20006
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 254C3 at Hondo, Texas, are 29-20-54 and 99-08-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-463

In the Matter of

Amendment of Section 73.202(b), RM-6896
Table of Allotments,
FM Broadcast Stations.
(Boyce, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7573 (1989), issued in response to a petition filed by Trinity Broadcasting Corporation (petitioner), proposing the substitution of Channel 272C3 for Channel 272A at Boyce, Louisiana. Petitioner also requested modification of its license for Station KBCE(FM), Channel 272A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 272C3 for Channel 272A at Boyce, Louisiana, since it would provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site located 5.7 kilometers (3.5 miles) east of the community.[1] In addition, we are modifying the petitioner's license for Station KBCE(FM) Boyce, Louisiana, to specify operation on Channel 272C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Boyce, Louisiana	272C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KBCE(FM), Boyce, Louisiana, IS MODIFIED to specify operation on Channel 272C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 272C3 are 31-22-21 and 92-36-41. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-467

In the Matter of

Amendment of Section 73.202(b), RM-7443
Table of Allotments,
FM Broadcast Stations.
(Gualala, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed on behalf of Dr. Gerhard Hanneman (petitioner) seeking the allotment of FM Channel 246B1 to Gualala, California, as its first local broadcast service. Petitioner stated his willingness to apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Gualala is not listed in the U.S. Census.

3. In view of Gualala's lack of inclusion in the U.S. Census, and in recognition of Commission precedent requiring sufficient information in such instances to demonstrate that a locality qualifies as a community for allotment purposes,[1] petitioner states that Gualala is listed in the 1990 Rand McNally Commercial Atlas and Marketing Guide, which attributes it with a population of 700 persons, and appears in the 1990 Rand McNally Road Atlas.[2] Further, petitioner advises that Gualala has its own post office, its own telephone exchange, as well as a volunteer fire department, water company, medical clinic, a church, banking facilities, a civic group, recreational facilities, and numerous business establishments. Therefore, based upon the petitioner's presentations, we will not request further demographic data at this time.

4. A staff engineering review of the proposal reveals that Channel 246B1 can be allotted to Gualala in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, with a site restriction of 9.1 kilometers (5.7 miles) northwest [3] of the community to avoid a short-spacing to Station KRQR(FM), Channel 247B, San Francisco, California.[4]

5. We believe the public interest would be served by proposing the allotment of Channel 246B1 to Gualala, California, since an interest has been expressed in providing that community with its first local broadcast service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Gualala, as follows:

	Channel No.	
City	Present	Proposed
Gualala, California	--	246B1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David M. Silverman, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See, e.g., Oak Grove, Florida,* 5 FCC Rcd 3774 (1990); *Hannibal, Ohio,* 5 FCC Rcd 3315 (1990); *Statenville, Georgia,* 5 FCC Rcd 2685 (1990); *Columbia, California,* 5 FCC Rcd 2003 (1990); and *Beaver Springs, Pennsylvania,* 4 FCC Rcd 5373 (1989).

[2] However, mere geographical location alone is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

[3] Coordinates used for Channel 246B1 at Gualala are 38-50-06 and 123-35-13.

[4] Coordinates at the licensed site of Station KRQR(FM) are 37-50-57 and 122-29-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-572

In the Matter of

Amendment of Section 73.202(b), RM-7020
Table of Allotments,
FM Broadcast Stations.
(Canaan, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8500 (1989), issued in response to a petition filed by Four Seasons Communications, Inc. ("Four Seasons") proposing the substitution of Channel 231C3 for Channel 231A at Canaan, Vermont.[1] Four Seasons also requested modification of its construction permit for Station WKQC(FM) to specify operation on the new channel.[2] Four Seasons submitted late-filed comments in which it reaffirmed its interest in the channel.[3]

2. We believe the public interest would be served by the substitution of Channel 231C3 for Channel 231A at Canaan, Vermont, since it would provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's current transmitter site.[4] Since Canaan is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, because the allotment creates short-spacings to Canadian Station CKMF, Channel 232C1, Montreal, Quebec, and vacant Channel 229A at East Angus, Quebec, we have obtained approval for Channel 231C3 at Canaan to operate as a specially negotiated short-spaced allotment. As requested, we are modifying the petitioner's construction permit for Station WKNW(FM), Canaan, Vermont, to specify operation on Channel 231C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Canaan, Vermont	231C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WKNW(FM) Canaan, Vermont, IS MODIFIED to specify operation on Channel 231C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The construction permit for Station WKNW(FM) was assigned from Four Seasons Communications, Inc. to Vector Broadcasting, Inc., effective July 2, 1990, pursuant to Commission approval of a *pro forma* assignment application (BAPH-900510HT). Both Vector Broadcasting and Four Seasons are controlled by Timothy D. Marty.

[2] The call sign of Station WKQC(FM) has been changed to WKNW(FM), effective March 1, 1990.

[3] Four Seasons Communications, Inc.'s comments were accompanied by a motion to accept. Since these comments merely express a continuing interest in the proposal, no harm will result from their acceptance. Vector Broadcasting, Inc. also filed comments supporting the upgrade at Canaan.

[4] The coordinates for Channel 231C3 are 45-01-20 and 71-25-05. Since the petition which resulted in this allotment was filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-468

In the Matter of

Amendment of Section 73.202(b), RM-7380
Table of Allotments,
FM Broadcast Stations.
(Wickenburg and Lake Havasu City,
Arizona)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 28, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Kenyon Communications (petitioner), licensee of Station KTIM-FM, Wickenburg, Arizona, requesting the substitution of Channel 287C1 for Channel 287C2 at Wickenburg, and modification of its license for Station KTIM-FM to specify operation on the higher powered channel. In order to accommodate the request in conformity with the Commission's minimum distance separation requirements, petitioner also requests the substitution of Channel 283C2 for Channel 286C2 at Lake Havasu City, Arizona, and concomitant modification of the license of Mad Dog Wireless, Inc., for Station KZUL-FM.

2. In support of its proposal, petitioner states that the requested modification of its facilities at its suggested site would provide a first FM service to a population of 3,878 persons in an area of 2,072 square kilometers.

3. A staff analysis reveals that Channel 287C1 can be substituted for Channel 287C2 at Wickenburg at the petitioner's suggested site 31.2 kilometers (19.4 miles) north of the community.[1] Channel 283C2 can be substituted for Channel 286C2 at Lake Havasu City, Arizona, at the authorized sites of Station KZUL-FM.[2] Additionally, since Wickenburg and Lake Havasu City, Arizona, are each located within 320 kilometers (199 miles) of the Mexican border, the Commission must seek concurrence of that Government in the proposal.

4. We believe the public interest would be served by the proposal since it could enable Station KTIM-FM to increase its service area. Therefore, we will seek comments on the proposal.

5. Since the petitioner's modification request at Wickenburg, Arizona, conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KTIM-FM without entertaining other expressions of interest. In addition, we shall direct an *Order to Show Cause* to the licensee of KZUL-FM at Lake Havasu City, Arizona, as to why its license should not be modified to specify operation on Channel 283C2 in lieu of Channel 286C2.

6. Whenever an existing licensee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. In this instance, petitioner has stated its willingness to reimburse Station KZUL-FM for its reasonable costs incurred in moving to Channel 283C2.

7. In view of the above, the Commission believes it is appropriate to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Lake Havasu City, Arizona	266C, 286C2	257C2,[3] 266C, 283C2
Wickenburg, Arizona	287C2	287C1

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Mad Dog Wireless, Inc., licensee of Station KZUL-FM, Lake Havasu City, Arizona, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 283C2 in lieu of Channel 286C2.

9. Pursuant to Section 1.87 of the Commission's Rules, Mad Dog Wireless, Inc. may, not later than **December 17, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Mad Dog Wireless, Inc. to furnish additional information. If Mad Dog Wireless, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Mad Dog Wireless, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making and Order to Show Cause* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station KZUL-FM as follows: Mad Dog Wireless, Inc., P.O. Box 1866, Lake Havasu City, Arizona 86403.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Steven A. Lerman, Esq.
Sally A. Buckman, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's suggested site for Channel 287C1 at Wickenburg are 34-14-02 and 112-50-13. Use of the suggested site negates a short-spacing to the site specified in MM Docket No. 89-75, authorizing the modification of Station KFAS-FM, Casa Grande, Arizona, to operate on Channel 288C2 at coordinates 33-00-00 and 111-57-30. Moreover, the Wickenburg site also meets the minimum distance separation requirements to a proposal in MM Docket No. 89-628 to change the community of license of Station KTDX(FM), Channel 287C, Winslow, Arizona, to Kachina Village, Arizona, and to reclassify its permit to specify operation on Channel 286C2 at coordinates 35-14-26 and 111-35-48.

[2] Coordinates at the licensed site of Station KZUL-FM, Lake Havasu City, are 34-29-10 and 114-13-06. Coordinates at the site specified in the construction permit issued to Station KZUL-FM (File No. BPH-890418ID) are 34-32-54 and 114-11-37.

[3] Channel 257C2 has been counterproposed for allotment to Lake Havasu City in MM Docket No. 88-490.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-469

In the Matter of

Amendment of Section 73.202(b), RM-7428
Table of Allotments,
FM Broadcast Stations.
(Tuscaloosa, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed on behalf of New South Radio, Inc. (petitioner), licensee of Station WACT-FM, Channel 288A, Tuscaloosa, Alabama, seeking the substitution of Channel 288C3 for Channel 288A, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering review of the proposal reveals that Channel 288C3 can be allotted to Tuscaloosa, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's specified site, located 19.3 kilometers (12 miles) northeast of the community,[1] to avoid a short-spacing to Station WVCA(FM), Channel 287C2, Selma, Alabama.[2] Moreover, this proposal is contingent upon the licensee of Station WWZQ-FM, Channel 288A, Aberdeen, Mississippi, relocating to Channel 287C3, as ordered in MM Docket No. 89-468. *See* 5 FCC Rcd 1777 (1990).

3. We believe the proposal warrants consideration since it could enable Station WACT-FM to expand its coverage area. As requested, we also propose to modify petitioner's license for Station WACT-FM to specify operation on the higher powered channel. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 288C3 at Tuscaloosa, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, in order to provide Tuscaloosa with an additional expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Tuscaloosa, Alabama	225C2, 239C1, 288A	225C1,[3] 239C1, 288C3

5. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Notice* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station WWZQ-FM, as follows:

Tenn-Tom Broadcasting Corp.
P.O. Box 1240
Aberdeen, MS 39730

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's specified site for Channel 288C3 at Tuscaloosa are 33-20-00 and 87-25-39.

[2] Coordinates at the authorized site of Station WVCA(FM) at Selma are 32-17-14 and 87-14-38 (see File No. BMPH-890717ID).

[3] The Commission is currently considering a proposal to substitute Channel 225C1 for Channel 225C2 at Tuscaloosa, as requested by Radio South, Inc., and to modify its license for Station WTUG(FM), accordingly. *See Notice of Proposed Rule Making,* MM Docket No. 89-322, 5 FCC Rcd 1777 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-470

In the Matter of

Amendment of Section 73.202(b), RM-7374
Table of Allotments,
FM Broadcast Stations.
(Laurel, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Jubilee Radio Network of Montana (petitioner) requesting the allotment of FM Channel 269C to Laurel, Montana, as that community's first FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated its intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed allotment could provide a first FM broadcast service to Laurel, Montana. Channel 269C can be allotted to Laurel, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the above, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Laurel, Montana	-----	269C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

A. Wray Fitch III
Gammon & Grange
1925 K Street, N.W.
Suite 300
Washington, D.C. 20006
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 269C are 45-40-24 and 108-46-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-137

In re Applications of	
Roy E. Henderson d/b/a PUEBLO RADIO BROADCASTING SERVICE	File No. BPH-861002TA
SANCHEZ COMMUNICATIONS, INC.	File No. BPH-861002TB
HAL S. WIDSTEN	File No. BPH-861002TE
CLASSIC MEDIA, INC.	File No. BPH-861002TF
BUENA SUERTE BROADCASTING CORPORATION	File No. BPH-861002TG
O-V COMMUNICATIONS	File No. BPH-681002TH
For Construction Permit for a New FM Station in Oro Valley, Arizona	

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1990; Released: October 25, 1990

By the Commission:

1. Before the Commission is a decision of the Review Board denying the appeal filed by Classic Media, Inc. from Administrative Law Judge Richard Sippel's *Memorandum Opinion and Order*, FCC 89M-1999 (Jul. 28, 1989), dismissing its application.[1] We agree with the Board's resolution of this case. We wish, however, to comment on certain matters.

2. Classic's application for a construction permit for a new FM radio station in Oro Valley, Arizona was not acceptable for filing because its proposed antenna height exceeded the height limitation for Class A stations within 320 kilometers (199 miles) of the Mexican border, thereby violating the 1972 Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band, 24 U.S.T. 1815, T.I.A.S. No. 7697 (U.S.- Mexican Agreement). However, the staff of the Mass Media Bureau inadvertently accepted Classic's application for filing and designated it for hearing with the other mutually exclusive applications for the Oro Valley allocation. *See Pueblo Radio Broadcasting Service*, 3 FCC Rcd 2010 (M.M. Bur. 1988). Bureau counsel advised Classic of the defect in its application before the hearing began, and shortly thereafter, Classic filed a petition for leave to amend its application, specifying a new transmitter site and facilities which complied with the terms of the U.S.-Mexican Agreement. The ALJ denied Classic's petition, finding that Classic had failed to show good cause to support the post-designation amendment as required by 47 C.F.R. § 73.3522(b)(1). *Memorandum Opinion and Order*, 89M-960 (Mar. 24, 1989). Thereafter, the ALJ granted a motion to dismiss Classic's application filed by a competing applicant. *Memorandum Opinion and Order*, FCC 89M-1999 (Jul. 28, 1989). The Review Board denied Classic's appeal, holding that the ALJ's action was fully consistent with the Commission's decision in *Kerrville Radio*, 2 FCC Rcd 3441 (1987), which upheld the Bureau's action returning an application that proposed an antenna height in excess of the limitations set forth in the U.S.-Mexican Agreement. *Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7510 (Rev. Bd. 1989). We agree with the Review Board that *Kerrville* is controlling and find no basis to distinguish Classic's application from the application dismissed in *Kerrville*.

3. In *Kerrville*, we upheld the staff's dismissal of an application that violated the U.S.- Mexican Agreement as unacceptable for filing prior to designation of other applications for hearing. *Id.* at ¶ 2. Classic argues that dismissal of its application after it had been designated for hearing is unduly harsh because the staff's failure to recognize the defect in its proposal during the initial processing caused Classic to incur the expense of participating in the hearing. We find that the factual differences between *Kerrville* and the case before us do not warrant a different result here.

4. The Commission's rules for FM radio stations place the responsibility for compliance with the U.S.- Mexican Agreement squarely on the applicant, not on the Commission's processing line. Applications that fail to comply with international broadcasting agreements are unacceptable for filing and are thus summarily rejected unless timely amended. *See Kerrville*, 2 FCC Rcd at 3442 ¶ 8; *1010 Broadcasting, Inc.*, 59 RR 2d 1124, 1125-26 ¶¶ 7-9 (1986). Under the "hard look" and "window" processing procedures for new FM applications, amendments that perfect the acceptability of a proposal may be filed as a matter of right only for a period of 30 days following release of the Public Notice accepting the application for tender. 47 C.F.R. § 73.3522(a)(6). *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19941 (May 13, 1985). After the period for amendment as of right has closed, amendments are permitted only upon a showing of good cause or for other reasons not relevant here. *See* 47 C.F.R. §§ 73.3522(a),(b).

5. Consistent with the "hard look" processing procedures, it was Classic's responsibility to review its application to ensure its acceptability. *See, e.g., R.A.D. Broadcasting Corporation*, 4 FCC Rcd 4772, 4773 ¶¶ 6-7 (1989), *appeal dismissed* No. 89-1413 (D.C. Cir. Feb. 27, 1990). The "hard look" processing procedures state that antenna height and power are evaluated in the course of an acceptability study and that those parameters may be affected by international agreements. *See* 50 Fed. Reg. at 19945. Moreover, the instructions to FCC Form 301 admonish applicants to familiarize themselves with the Commission's rules, which make specific reference to the U.S.- Mexican Agreement. *See Kerrville*, 2 FCC Rcd at

3442 ¶ 6. *Kerrville* and other precedent make clear that applicants may not avoid the "hard look" processing rules on the basis of ignorance; applicants are on notice that the provisions of international agreements may affect the acceptability of applications. Classic had ample opportunity to file an amendment to correct the defect in its application within the period for filing amendments as of right. *See R.A.D. Broadcasting Corporation*, 4 FCC Rcd at 4773 ¶ 7; *Richard P. Bott, II*, 3 FCC Rcd 6063, 6064 ¶ 8 (1988). Moreover, Classic cannot be permitted to avoid dismissal of its application based on the staff's inadvertent failure to return its application. Classic bore the risk that its application would be dismissed even though the staff failed to detect the violation of the U.S.- Mexican Agreement prior to designation of the application for hearing. *See, e.g., M & C Broadcasting, Inc.*, FCC 85-217, slip op. at 3-4 ¶¶ 9-11 (Apr. 29, 1985); *220 Television, Inc.*, 81 FCC 2d 575, 576-77 ¶¶ 3-4 (1980) (The Commission is not estopped from application of rules because of error by the staff). Therefore, the staff's error does not excuse Classic from complying with the acceptability criteria.

6. We also agree with the ALJ that Classic failed to demonstrate good cause to file a post-designation amendment. *See* 47 C.F.R. § 73.3522(b)(1).[2] Good cause sufficient to support a post-designation amendment of an engineering proposal requires a showing that the amendment is necessitated by events which the applicant could not have reasonably foreseen. *See* 47 C.F.R. § 73.3522(b)(1)(i). Classic argues that it relied on its consulting engineer to propose facilities which complied with the U.S.- Mexican Agreement; therefore, it had no reason to foresee that the engineer would fail to take the agreement into account. (The existence of the U.S.- Mexican Agreement was, of course, foreseeable in the sense that it is not an unexpected event.) However, the "hard look" cases hold that an applicant cannot avoid dismissal of its proposal by assigning the responsibility for compliance with the acceptability criteria to its consulting engineer. *See R. A. D. Broadcasting Corporation*, 4 FCC Rcd at 4773 ¶ 7. [3] The "hard look" processing procedures are intended to place a greater burden on the applicant in order to make more efficient use of Commission staff and resources in an effort to provide service to the public expeditiously. *See Richard P. Bott, II*, 3 FCC Rcd at 6064 ¶¶ 8, 11, 12. Although the "hard look" processing procedures did not alter the standards for acceptance of post-designation amendments, the policy and precedent associated with the "hard look" necessarily affect the good cause analysis to which post-designation amendments are subject, since otherwise the acceptance of post-designation amendments would undermine the benefits of "hard look." Classic had notice of the existence of the U.S.-Mexican Agreement as well as the responsibility to conform its proposal to the terms of that treaty by the close of the period for filing amendments as of right. We therefore find that Classic has failed to satisfy the foreseeability element of the good cause showing required for post-designation engineering amendments pursuant to 47 C.F.R. § 73.3522(b)(1)(i).[4]

7. ACCORDINGLY, IT IS ORDERED, That the Petition for Waiver of the page limitation of 47 C.F.R. § 1.115(f) filed November 13, 1989 by Classic Media, Inc. IS GRANTED and the Application for Review filed November 13, 1989 by Classic Media, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The pleadings pending before the Commission include: (1) Classic's petition for waiver of the page limitation of 47 C.F.R. § 1.115 (f), filed November 13, 1989; (2) Classic's application for review filed November 13, 1989; and (3) the Bureau's opposition to Classic's application for review, filed November 28, 1989. Classic's petition for a waiver of 47 C.F.R. § 1.115(f) will be granted herein to ensure that no significant arguments are overlooked.

[2] We reject Classic's argument that it should have been given the opportunity to file a post-designation amendment as a matter of right pursuant to 47 C.F.R. § 73.3522(b)(2), which allows for amendments in response to issues first raised in the hearing designation order. *See* 50 Fed. Reg. at 19946. Although Classic contends that the issue of compliance with the U.S.- Mexican Agreement is a matter of grantability for which an appropriate issue should have been specified in the hearing designation order, it is well settled that noncompliance with the U.S.-Mexican Agreement goes to the acceptability, not grantability, of an application. *See Domega Broadcasting Corporation*, 4 FCC Rcd 1450, 1451 ¶ 7 (1989).

[3] Classic cites *Magdalene Gunden Partnership*, 2 FCC Rcd 5513, 5515 ¶¶ 7-8 (Rev. Bd. 1987), *recon. denied*, 3 FCC Rcd 488 (Rev. Bd. 1988), *rev. denied on other grounds*, 3 FCC Rcd 7186 (1988), *pet. for recon. denied*, 5 FCC Rcd 2509 (1990) in support of the proposition that an applicant should not be held responsible for foreseeing issues involving the highly technical engineering aspects of its proposal which its consulting engineer fails to take into account. We believe that the facts in that case are distinguishable. In *Gunden*, the ALJ found good cause for accepting an amendment specifying a new transmitter site, which mooted the question raised by a competing applicant as to whether an applicant's original site would provide the requisite signal strength to the principal city of license. The ALJ found that the applicant's consulting engineer had selected the site without first determining the potential terrain blockage that would result in signal loss due to shadowing but that the applicant had reasonably relied on the engineer's assessment that the required city-grade coverage would be provided and could not have foreseen his failure to conduct an appropriate survey. While affirming the ALJ's acceptance of the amendment, the Board did not specifically adopt the ALJ's reasoning with respect to foreseeability. Rather, the Review Board relied on the Mass Media Bureau's proposed finding that the applicant's original proposal had indeed complied with the city-grade coverage rules notwithstanding the shadowing problems. Therefore, the Board found that the addition of the city coverage issue and the need to amend were unforeseeable within the meaning of 47 C.F.R. § 73.3522 (b)(1)(i). Here, by contrast, Classic's original proposal violated an international broadcasting agreement.

[4] Classic also characterizes the pertinent provision of the U.S.-Mexican Agreement as obsolete and likely to be amended. Therefore, Classic argues that Mexico would not object to its proposal. The Commission, however, has no authority to waive the provisions of a treaty. *1010 Broadcasting, Inc.*, 59 RR 2d at

1125-26 ¶ 9. An application's acceptability is governed by the treaty provisions in force at the time the application was filed. *Id.*at 1125 ¶ 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-461

In the Matter of

Amendment of Section 73.202(b), RM-6881
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 11, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Brian Mitchell Rowland (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7568 (1989), proposing the substitution of Channel 260C2 for Channel 260A at Lafayette, Florida, and the modification of his construction permit for Station WQHI, to specify the higher class channel. Petitioner filed comments restating his intention to apply for the channel, if allotted. No other comments were received.

2. Channel 260C2 can be substituted for Channel 260A at Lafayette in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.8 kilometers (12.9 miles) southeast to accommodate petitioner's desired transmitter site,[1] and to avoid a short-spacing to Station WOOF(FM), Channel 259C1 at Dothan, Alabama.

3. We believe the public interest would be served by the substitution of Channel 260C2 for Channel 260A at Lafayette, Florida, since it could provide the area with an expanded FM service. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the construction permit of Station WQHI to specify operation on Channel 260C2.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lafayette, Florida	260C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WQHI-FM, Lafayette, Florida, IS MODIFIED, to specify operation on Channel 260C2 in lieu of Channel 260A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 260C2 at Lafayette are North Latitude 30-18-21 and West Longitude 84-03-09. Because the petition for rule making in this proceeding was filed prior to October 2, 1989, petitioner may avail himself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-471

In the Matter of

Amendment of Section 73.202(b), RM-7432
Table of Allotments,
FM Broadcast Stations.
(Cadillac, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by MacDonald Broadcasting Company ("petitioner"), requesting the substitution of FM Channel 244C3 for Channel 244A at Cadillac, Michigan. Petitioner also requests modification of its license for Station WWLZ(FM), Channel 244A, to specify operation on Channel 244C3.

2. We believe petitioner's proposal warrants consideration because the proposed allotment could provide a wide coverage area station for Cadillac. Channel 244C3 can be allotted to Cadillac, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules, at the petitioner's specified site.[1] Since Cadillac is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government will be requested. We shall also propose to modify the license of Station WWLZ(FM), Channel 244A, to specify operation on Channel 244C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cadillac, Michigan	225C, 244A, 296A	225C, 244C3, 296A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard Hildreth
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2579
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 244C3 are 44-20-25 and 85-35-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-199

In the Matter of

Amendment of Section 73.202(b), RM-7098
Table of Allotments,
FM Broadcast Stations.
(Beattyville, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Hour of Harvest, Inc. ("Harvest"), licensee of Station WLJC(FM), Channel 272A, Beattyville, Kentucky, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 2588 (1990), proposing the substitution of Channel 271A for Channel 272A at Beattyville, Kentucky, and the modification of its license for Station WLJC(FM) to specify the alternate Class A channel. Harvest filed comments restating its intention to apply for Channel 271A, if allotted. Carter County Broadcasting Company, Inc. ("Carter"), licensee of Station WUGO(FM), Grayson, Kentucky, filed comments and reply comments.

2. Carter, in its comments and reply comments, supports the substitution of Channel 271A for Channel 272A at Beattyville. Carter claims that Station WUGO is short-spaced to Station WLJC at its current transmitter site, and the proposed change would eliminate the short-spacing. In addition, argues Carter, Harvest's proposal will permit Station WUGO to increase its power to 6 kilowatts, thereby increasing the station's service area and reducing shadowing caused by the mountainous terrain of northeastern Kentucky.

3. Channel 271A can be allotted to Beattyville in compliance with the Commission's minimum distance separation requirements at Station WLJC(FM)'s currently licensed site, with a site restriction of 3.9 kilometers (2.4 miles) northwest[1] of the community.

4. We believe the public interest would be served by substituting Channel 271A for Channel 272A at Beattyville, Kentucky, since it would eliminate the short-spacing between Station WLJC and Station WUGO, as well as a short-spacing between Station WLJC and Station WYCN, Cynthiana, Kentucky. As proposed, we are modifying the license of WLJC(FM) to specify Channel 271A in lieu of Channel 272A.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Beattyville, Kentucky	271A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WLJC(FM), Beattyville, Kentucky, IS MODIFIED to specify operation on Channel 271A in lieu of Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WLJC(FM)'s license, BLH-860304KG, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-860304KG, except for the channel as specified above and a license application (FCC Form 302/341) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 271A at Beattyville are North Latitude 37-36-23 and West Longitude 83-41-16. Since this allotment is made as a result of a petition filed prior to October 2, 1989, petitioner may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-484

In the Matter of

Amendment of Section 73.202(b),	RM-6972
Table of Allotments,	
FM Broadcast Stations.	
(Edinboro, Pennsylvania)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of WinCapp Broadcasting, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8080 (1989), proposing the substitution of Channel 250B1 for Channel 250A at Edinboro, Pennsylvania, and the modification of its license for Station WXTA (formerly Station WMYJ) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 250B1, if allotted. No other comments were received.

2. Channel 250B1 can be allotted to Edinboro in compliance with the Commission's minimum distance separation requirements, and can be used at the present transmitter site of Station WXTA, with the exception of a 5.2 kilometer (3.2 mile) short-spacing to Station CHTZ-FM, Channel 249B, St. Catharines, Ontario, Canada.[1] Canadian concurrence has been received for the allotment of Channel 250B1 to Edinboro as a specially negotiated allotment since the community is located within 320 kilometers of the U.S.-Canadian border. As proposed, we will also modify petitioner's license for Station WXTA to specify operation on Channel 250B1.

3. We believe the public interest would be served by substituting Channel 250B1 for Channel 250A at Edinboro, Pennsylvania, since it could provide the community with a local wide coverage area FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Edinboro, Pennsylvania	250B1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of WinCapp Broadcasting, Inc., for Station WXTA, Edinboro, Pennsylvania, IS MODIFIED to specify operation on Channel 250B1, in lieu of Channel 250A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 250B1 are North Latitude 41-57-59 and West Longitude 80-06-40. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the petitioner may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-489

In the Matter of

Amendment of Section 73.202(b), RM-6955
Table of Allotments,
FM Broadcast Stations.
(Barnwell, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Radio WBAW, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7965 (1989), proposing the substitution of Channel 256C3 for Channel 256A at Barnwell, South Carolina, and the modification of petitioner's license for Station WBAW-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 256C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 256C3 for Channel 256A at Barnwell, South Carolina, since it could provide the community with its first local wide coverage area service. Channel 256C3 can be allotted to Barnwell in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[1] As proposed, we will also modify petitioner's license for Station WBAW-FM to specify operation on Channel 256C3 in lieu of its present Channel 256A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Barnwell, South Carolina	256C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Radio WBAW, Inc., for Station WBAW-FM, Barnwell, South Carolina, IS MODIFIED to specify operation on Channel 256C3, in lieu of Channel 256A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Chanel 256C3 at Barnwell are North Latitude 33-13-25 and West Longitude 81-21-35. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the applicant may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-528

In the Matter of

Amendment of Section 73.202(b), RM-7045
Table of Allotments,
FM Broadcast Stations.
(Hatteras, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Heart of Dixie Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8291 (1989), proposing the allotment of Channel 232A to Hatteras, North Carolina, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received. Channel 232A can be allotted to Hatteras in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by allotting Channel 232A to Hatteras, since it could provide the community with its second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hatteras, North Carolina	232A, 246C1

3. The window period for filing applications for Channel 232A at Hatteras, North Carolina, will open on **December 11, 1990,** and close on **January 10, 1991.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 232A at Hatteras are North Latitude 35-12-54 and West Longitude 75-41-30. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules
regarding the operation of radio
frequency devices without an
individual license - GM and M/A-COM
petitions for reconsideration

MEMORANDUM, OPINION AND ORDER

Adopted: September 26, 1990; Released: October 26, 1990

By the Commission:

INTRODUCTION

1. By this action, the Commission grants in part the petitions filed by General Motors Research Corporation (GM) and by M/A-COM, Inc. (M/A-COM) requesting partial reconsideration and clarification of the *First Report and Order* (*R&O*) in this proceeding.[1] The petitioners request reconsideration of that portion of the *R&O* which reduces the field strength permitted in the restricted frequency bands for harmonic emissions of field disturbance sensors (FDSs).[2] The rule changes adopted herein will continue to allow operation of economical field disturbance sensor equipment and will also continue to ensure that such equipment does not pose a significant threat of interference to authorized communications users.

BACKGROUND

2. In the *R&O*, the Commission adopted a comprehensive revision of Part 15 of the rules. These rules govern radio frequency devices that may be operated without an individual license. The objective of this revision was to encourage more effective use of the radio frequency spectrum while providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices. To limit the amount of interference caused to certain sensitive radio services, the Commission prohibited all intentional radiators from operating in several restricted frequency bands. [3] The Commission also specified limits on spurious emissions in the restricted frequency bands for intentional radiators.[4] Previously the prohibitions and limitations on operating in specific restricted bands applied to control and security alarm devices only.

3. Field disturbance sensors operate by establishing a radio frequency field and then detecting changes in that field caused by the movement of nearby persons or objects. Field disturbance sensors are commonly used to open doors or detect intruders. Many FDSs operate on 10.525 GHz. The second and third harmonics of 10.525 GHz fall in restricted frequency bands established in the Part 15 revision.[5] The new rules limit harmonic and other spurious emissions in these bands to 500 microvolts/meter (uV/m) at a distance of 3 meters. Under the previous rules, the limit for FDS harmonic emissions, on the same frequencies, was 2,500 uV/m at 30 meters.[6]

GM PETITION

4. General Motors Research Corporation filed its petition on behalf of its parent General Motors Corporation, a manufacturer of automobiles and automotive components. GM indicates it is developing an FDS for operation on 10.525 GHz that will detect persons and obstacles behind a motor vehicle when the vehicle is operating in reverse gear.

5. GM argues that the new spurious emission limit is too restrictive for harmonics of FDSs operating at 10.525 GHz. GM believes that the record in this proceeding provided no justification or explanation for the change. In addition, it indicates that this recent action is inconsistent with previous Commission proceedings that liberalized the harmonic emission limits for FDSs.[7] GM observes that the Commission took these actions because there had been no history of interference having been caused to radio services.

6. GM further notes that the harmonic emission limits for licensed transmitters, including police traffic radars that also operate on 10.525 GHz, are generally less restrictive than the new limit that applies to FDS harmonics. It contends there is no justification for applying more severe standards to Part 15 equipment than to transmitters operating under other FCC rule parts. In addition, GM submits that compliance with the new limit is an excessive burden that would mandate significant changes in almost every current and future FDS operating on 10.525 GHz. GM requests that the Commission modify the rules adopted in the *R&O* to allow FDSs operating in the band 10.500-10.550 GHz to operate under the harmonic emission limit in Section 15.245, which is equivalent to the limit in effect for FDS devices prior to the adoption of the *R&O*.

M/A-COM PETITION

7. M/A-COM is a manufacturer of microwave semiconductor components, subassemblies and subsystems. It supplies these components and subsystems to manufacturers who produce FDS equipment that operates on 10.525 GHz. M/A-COM's petition requests clarification or reconsideration of the limit on harmonic emissions from these devices.

8. M/A-COM is concerned about the impact the new limit will have on the FDS industry. It submits that to accommodate the filtering necessary to reduce harmonic emissions, FDSs will have to undergo physical redesign resulting in increases in cost, size and weight. M/A-COM believes these changes will adversely affect the public by making products much more expensive and, in some cases, impractically large. M/A-COM also argues that the previous harmonic emission limits on FDS equipment provided adequate protection against potential interference to other users. Finally, M/A-COM suggests that the rules which limit the harmonic emissions of FDSs, Sections 15.205, 15.209, and 15.245, are ambiguous when taken together.

COMMENTS

9. No formal comments were filed in response to the petitions. Informal comments, in support of the petitions, were submitted by Southwest Microwave Inc. (SW Microwave), C & K Systems, Inc., and Napco Security Systems, Inc. (NAPCO).[8]

10. SW Microwave is a manufacturer of FDSs used for outdoor intruder alarm systems. Such systems protect public utilities, nuclear power plants, and government facilities that range from state prisons to the Pentagon. SW Microwave states that the new limit, if it became effective, would dramatically increase the cost of its systems. SW Microwave asserts that the increased cost would create a financial hardship for potential users.

11. C&K Systems, Inc. is a manufacturer of FDS motion sensors used by the security industry. C&K states that compliance with the new rules would necessitate increases in the size and cost of "dual detector"[9] burglar alarm systems that would render this equipment impractical for residential use.

12. NAPCO is a manufacturer of residential, industrial and commercial burglar alarm equipment that use FDSs. NAPCO states that the new rules, because of the added filtering necessary to meet the new regulations, would require its products to be so large, heavy and expensive that NAPCO would not be able to compete with companies manufacturing products using different technology.

NTIA PROPOSAL

13. The restricted bands were developed and established in cooperation with the United States Department of Commerce, National Telecommunications and Information Administration (NTIA). NTIA has responsibility for coordinating and authorizing communications used by the federal government and its agencies. Accordingly, the petitions and comments were referred to NTIA for comment.

14. On March 19, 1990, NTIA filed a proposal for responding to the GM and M/A-COM petitions. NTIA states that, as the next generation of military and NASA satellites are brought into service, widespread use of fixed and mobile satellite earth stations in the 20.1-21.1 GHz band is planned. It also states that radio astronomy and satellite passive sensing activities are being conducted in, and planned for, the 31.2-31.8 GHz band. After studying the potential for interference to these activities, NTIA proposes a three part plan for regulating FDS harmonic emissions in the restricted bands above 17.7 GHz.[10] First, it proposes that the limit on harmonic emissions in these bands from FDSs designated for use only inside buildings be relaxed from 500 uV/m to 25 millivolts/meter (mV/m) measured at 3 meters. This is equivalent to the previous limit. Second, NTIA proposes that the FDS harmonic emission limit in these bands be relaxed to 7.5 mV/m measured at 3 meters for operations outside buildings.[11] Finally, NTIA further proposes that FDSs used on mobile vehicles not be permitted to operate in a continuous mode. NTIA expresses concern that continuously-operated FDSs used on mobile vehicles are far more likely to cause interference than those that operate under circumstances which occur for short periods and with limited frequency, such as GM's Near Obstacle Detection System which operates only when a vehicle is in reverse gear.

15. On April 4, 1990 the Commission issued a Public Notice requesting comments on NTIA's proposal.[12] Specific comments were requested concerning NTIA's recommendation to prohibit FDS usage in mobile vehicles on a continuous basis, how to define continuous operation, and whether there are any reasonable alternatives to such a prohibition. Responses to the Public Notice were submitted by GM, M/A-COM, Linear Corporation (Linear) and the National Academy of Sciences through the National Research Council's Committee on Radio Frequencies (CORF).

16. GM states that, while it prefers that the harmonic emission limit be returned to its former value, it has no objection to the basic intent of the NTIA proposal. However, GM believes that two clarifications are needed for the vehicle provision. First, it submits that the limitation on continuous operation should apply to highway vehicles only and not to other more limited classes of vehicles, such as railroad locomotives and farm vehicles. Secondly, GM believes the limitation on continuous operation should not apply if the harmonics from the FDS comply with the general emission limits in Section 15.209. Regarding a definition for continuous operation, GM states that the key distinction is whether the FDS transmits on a regular basis whenever the motor vehicle is in operation, or its operation is limited to specific activities of limited duration (for example, putting the car into reverse gear or activating the turn signal).

17. M/A-COM states that the NTIA proposal generally provides a reasonable compromise that will serve the public interest and, therefore, should be adopted. However, M/A-COM requests that the Commission not apply the proposed outdoor limit to FDSs used on door openers, because the same device is typically used on both outside and inside locations. It further states that these FDSs use the same low cost techniques as indoor FDSs. M/A-COM believes that these FDSs are not a source of interference because the buildings they are attached to provide attenuation of the FDS signals in most directions. It, therefore, believes that allowing door openers to meet the less stringent inside level will not cause harmful interference.

18. Linear, a manufacturer of security devices, states that the NTIA's analysis of potential interference is quite conservative and reliable. Linear suggests that the harmonic emission limit for other restricted frequency bands between 1 GHz and 17.7 GHz should also be relaxed and that the new emission limits be applied for all Part 15 devices.

19. CORF notes that the third harmonic from FDSs operating at 10.525 GHz falls in the band 31.3 - 31.8 GHz. CORF states that this band is used for important passive research studies such as Radio Astronomy, Earth Exploration-Satellite and Space Research Services. CORF requests that the Commission retain the stricter limit adopted in the *R&O*. In addition, CORF states that FDSs used on motor vehicles present the greatest potential for interference to radio astronomers since, even at remote sites, automobiles equipped with FDS systems can come into relatively close proximity to a radio astronomy observatory. CORF therefore agrees with NTIA that continuous usage of FDSs in vehicles should be prohibited.

DISCUSSION

20. We conclude that the changes proposed by NTIA are based on a conservative and reasonable analysis of potential interference. These changes would continue to allow FDS operation at 10.525 GHz in an economically-achievable manner, while maintaining a low likelihood of harmful interference. Retention of the more conservative limit adopted in the *R&O* would increase the cost of compliance and, possibly, decrease the availability of FDSs to the public. Moreover, while CORF advocates retention of the more severe limit, based on the NTIA analysis we do not believe that limit would provide any appreciable reduction in interference potential. Accordingly, we are adopting FDS harmonic limits as described below.[13]

21. The emissions from 10.525 GHz FDSs used indoors are greatly attenuated by materials in the walls and ceilings of buildings before reaching outdoors. This attenuation, coupled with the outdoor nature of the communications activities in the restricted bands, makes it reasonable to allow higher harmonic emission levels indoors.[14] Therefore, we are relaxing the harmonic emission limit for FDSs designed for use only inside buildings to 25 mV/m measured at 3 meters. This is essentially the same limit as that specified in the previous harmonic limit for FDSs.

22. There also are several aspects of outdoor FDS operations that reduce the likelihood they will cause interference to restricted band users. FDS signals are generally highly directional. Thus, it is unlikely that an FDS signal would be pointed directly at authorized communications systems. Moreover, many FDS systems operating outdoors are at fixed locations. If interference occurs from a fixed FDS, the source can be traced easily and the interference remedied by realigning the FDS system. The government or other restricted band user can also require the emissions from FDSs installed on their property to be attenuated more than that which is needed for FDSs used by the public. We believe the 7.5 mV/m measured at 3 meters outdoor limit proposed by NTIA will provide adequate protection for restricted band users and, accordingly, are adopting this as the new standard.

23. We agree with NTIA that FDSs used in mobile vehicles represent the greatest potential source of interference to restricted band users. It is difficult to predict when and where a mobile FDS will operate. However, we also agree with GM that railroad locomotives, as well as railroad cars and other equipment which travels on fixed track, pose less interference risk than other vehicles. Restricted band users can more easily avoid or protect against potential interference from trains. To address GM's concern regarding railroad operations and farm equipment and to make the rules comparable with those elsewhere in this Part,[15] we are applying the prohibition on continuous operation only to *motor* vehicles and aircraft. The term motor vehicle includes only vehicles that operate on highways, such as trucks, automobiles, and buses. FDS devices used on railroad locomotives, cars, and other track equipment and farm equipment will be permitted to operate on a continuous basis. In addition, the prohibition on continuous operation will not apply to vehicles, such as fork lifts, that are used primarily indoors or for very specialized operations. Finally, we are adopting GM's suggestion that the prohibition on continuous operation not apply if the FDS complies with the restricted band limits contained in Sections 15.205 and 15.209.

24. Based on the comments, we believe that continuous operation is best defined by making the distinction as to whether the FDS transmits on a regular basis whenever the vehicle is in operation or only during periods of limited duration when the vehicle performs certain specific activities. For example, such activities would include operation in reverse gear or signaling a turn. Therefore, we will consider a vehicle-mounted FDS to not be operating in a continuous mode if the device's operation is limited to specific activities of limited duration.

25. We agree with M/A-COM that the outdoor limit should not be imposed on door openers. These FDSs are not a likely source of interference because they operate over an extremely short distance and are usually aimed towards the ground. They generally are mounted in such a manner that the building provides enough shielding to protect against the weather and also provides attenuation of the FDS signal. In addition, their location can be easily identified and controlled. Accordingly, FDS devices used to open doors will be subject to the indoor emission limit.

26. Linear states that the Commission should also relax the restricted band harmonic emission limit between 1 GHz and 17.7 GHz. It also proposes that any such setting of emission limitations be applied to all Part 15 devices. These proposals go beyond the scope of this reconsideration and, therefore, we will not address them herein.

ORDERING CLAUSES

27. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304 and 307 of the Communications Act of 1934, as amended, IT IS ORDERED that the Petition for Clarification or Reconsideration filed by M/A-COM, Inc. and the Petition for Partial Reconsideration filed by General Motors Research Corporation ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED. In addition, IT IS ORDERED that Part 15 of the Commission's Rules and Regulations IS AMENDED as set forth below. These rules and regulations are effective 30 days after publication in the Federal Register.

CHANGES TO THE REGULATIONS

Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.205 is amended by revising paragraphs (b) and (c) and adding a new paragraph (e), to read as follows:

Section 15.205 *Restricted bands of operation.*

* * * * *

(b) Except as provided in paragraphs (d) and (e), the field strength of emissions appearing within these frequency bands shall not exceed the limits shown in Section 15.209. At frequencies equal to or less than 1000 MHz, compliance with the limits in Section 15.209 shall be demonstrated using measurement instrumentation employing a CISPR quasi-peak detector. Above 1000 MHz, compliance with the emission limits in Section 15.209 shall be demonstrated based on the average value of the measured emissions. The provisions in Section 15.35 apply to these measurements.

(c) Except as provided in paragraphs (d) and (e), regardless of the field strength limits specified elsewhere in this Subpart, the provisions of this Section apply to emissions from any intentional radiator.

* * * * *

(e) Harmonic emissions appearing in the restricted bands above 17.7 GHz from field disturbance sensors operating under the provisions of Section 15.245 shall not exceed the limits specified in Section 15.245(b).

3. Section 15.245 is amended by revising paragraphs (b), (b)(1), (b)(2), and (b)(3), and by adding new paragraphs (b)(1)(i), (b)(1)(ii), (b)(1)(iii) and (b)(4), to read as follows:

Section 15.245 *Operation within the bands 902-928 MHz, 2435-2465 MHz, 5785-5815 MHz, 10500-10550 MHz, and 24075-24175 MHz.*

* * * * *

(b) The field strength of emissions from intentional radiators operated within these frequency bands shall comply with the following:

Fundamental Frequency (MHz)	Field Strength of Fundamental (millivolts/meter)	Field Strength of Harmonics (millivolts/meter)
902-928	500	1.6
2435-2465	500	1.6
5785-5815	500	1.6
10500-10550	2500	25.0
24075-24175	2500	25.0

(1) Regardless of the limits shown in the above table, harmonic emissions in the restricted bands below 17.7 GHz, as specified in Section 15.205, shall not exceed the field strength limits shown in Section 15.209. Harmonic emissions in the restricted bands at and above 17.7 GHz, and below 40 GHz, shall not exceed the following field strength limits:

(i) For field disturbance sensors designed for use only within a building or to open building doors, 25.0 mV/m.

(ii) For all other field disturbance sensors, 7.5 mV/m.

(iii) Field disturbance sensors designed to be used in motor vehicles or aircraft must include features to prevent continuous operation unless their emissions in the restricted bands fully comply with the limits given in Section 15.209. Continuous operation of field disturbance sensors designed to be used in farm equipment, vehicles such as fork lifts that are intended primarily for use indoors or for very specialized operations, or railroad locomotives, railroad cars and other equipment which travels on fixed tracks is permitted. A field disturbance sensor will be considered not to be operating in a continuous mode if its operation is limited to specific activities of limited duration (*e.g.*, putting a vehicle into reverse gear, activating a turn signal, etc.).

(2) Field strength limits are specified at a distance of 3 meters.

(3) Emissions radiated outside of the specified frequency bands, except for harmonics, shall be attenuated by at least 50 dB below the level of the fundamental or to the general radiated emission limits in Section 15.209, whichever is the lesser attenuation.

(4) The emission limits shown above are based on measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 87-389, adopted March 30, 1989, 4 FCC Rcd 3493 (1989). Unless otherwise stated, all references herein to Part 15 regulations are to the rules adopted therein.

[2] Harmonic emissions are "out-of-band" or spurious signals that fall on integer multiples of the frequency of operation.

[3] The restricted frequency bands are defined in Section 15.205(a) of the rules. These bands are allocated to radio services that involve safety-of-life or that utilize very low signal levels, such as radio astronomy.

[4] *See* 47 CFR Sections 15.205(b), 15.205(c), and 15.209.

[5] Although we refer to FDSs as operating on 10.525 GHz, they are permitted to operate anywhere in the band 10.500-10.550 GHz. The second harmonic of an FDS operating in this band would fall in the 21.0-21.1 GHz band; the third harmonic, in the 31.50-31.65 GHz band. These bands fall in the 17.7-21.4 GHz and 31.2-31.8 GHz restricted bands.

[6] This is equivalent to 25 mV/m at 3 meters, assuming free space attentuation.

[7] GM cites *Report and Order*, Docket No. 19685, adopted September 26, 1973, 38 FR 27821; and, *Memorandum, Opinion and Order* in response to RM-3654, adopted November 18, 1980, 45 FR 81568.

[8] NAPCO's comments were sent to the Commission via the Honorable Alfonse D'Amato, United States Senator, in a letter dated December 22, 1989. The NAPCO letter and the Commission's response were made part of the docket file.

[9] Dual detector burglar alarm systems use both an infrared detector and an FDS detector to sense the motion of objects. Dual detector systems reduce false alarms because both detectors must sense motion before initiating an alarm condition.

[10] NTIA proposed that the new limits apply above 17.7 GHz because no safety services are in the restricted bands above that frequency.

[11] This limit is 23.5 dB higher than the current limit, and 10.5 dB less than the previous limit.

[12] "Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License", DA 90-500, April 4, 1990. A similar Public Notice was placed in the Federal Register on April 13, 1990, 55 FR 13907.

[13] The relaxations of harmonic emission standards for FDS devices specified herein do not exempt field disturbance sensors from the requirement of Section 15.215(b) that the level of any unwanted emission from an intentional radiator not exceed the level of the fundamental emission.

[14] Satellite earth stations and radio astronomy facilities, as well as satellites used for passive sensing, generally receive signals using equipment that operates outdoors.

[15] *See* Section 15.103(a), for example.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-473

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Edenton and Scotland Neck, North Carolina) RM-7392

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Lawrence F. and Margaret A. Loesch ("petitioners") requesting the substitution of Channel 273C2 for Channel 272A at Edenton, North Carolina, and the modification of their license for Station WZBO-FM to specify operation on the higher powered channel. In order to accommodate the allotment of Channel 273C2 to Edenton, petitioners also request the substitution of Channel 238A for Channel 274A at Scotland Neck, North Carolina, and the modification of Station WWRT's construction permit to specify the alternate Class A allotment. Petitioners state that they will apply for Channel 273C2, if allotted to Edenton.

2. We believe the public interest would be served by proposing the substitution of Channel 273C2 for Channel 272A at Edenton, North Carolina, since it could enable Station WZBO-FM to expand its coverage area. An Order to Show Cause need not be issued to WYAL Radio, Inc., permittee of Station WWRT at Scotland Neck, since it has already agreed to the substitution of channels in connection with the petition of LBS Broadcasting, Inc. which seeks an upgrade of its station at Appomattox, Virginia, from Channel 274B to Channel 274C1 (RM-7299). Therefore, WYAL Radio is deemed to have consented to the substitution requested in this proceeding. However, we note that petitioners have not made the required commitment to reimburse WYAL Radio for the reasonable costs associated with the change in its channel. Commission policy requires a benefitting party to reimburse an authorized facility for the reasonable costs associated with a change in its operating channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). In this case, both the petitioners in this proceeding and LBS Broadcasting will benefit from the change in Station WWRT's operating channel. Therefore, the petitioners are requested to state their willingness to reimburse WYAL Radio for the costs associated with the change in its channel. If the petition of LBS Broadcasting is ultimately granted, LBS Broadcasting would be expected to share equally in the reimbursement costs.

3. Channel 273C2 can be allotted to Edenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) southeast to avoid a short-spacing to Station WHLQ, Channel 273A, Louisburg, North Carolina, and to accommodate petitioner's desired transmitter site. Channel 238A can be allotted to Scotland Neck and can be used at the site specified in Station WWRT's outstanding construction permit.[1] As requested, we also propose to modify petitioners' license for Station WZBO-FM to specify operation on Channel 273C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 273C2 at Edenton or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Edenton, North Carolina	261C2, 272A	261C2, 273C2
Scotland Neck, North Carolina	274A	238A

5. IT IS ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to Station WWRT, as follows: Station WWRT, WYAL Radio, Inc., P.O. Box 425, Scotland Neck, North Carolina 27874.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 20, 1990,** and reply comments on or before **January 4, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
P.O. Box 1151
209 Fayetteville Street Mall
Raleigh, North Carolina 27602
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 273C2 at Edenton are North Latitude 35-55-52 and West Longitude 76-31-34. The coordinates for Channel 238A at Scotland Neck are 36-08-09 and 77-26-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-527

In the Matter of

Amendment of Section 73.202(b), RM-7044
Table of Allotments,
FM Broadcast Stations.
(Valley City, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Ingstad Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8309 (1989), proposing the substitution of Channel 266C1 for Channel 265A at Valley City, North Dakota, and the modification of its license for Station KOVC-FM (formerly Station KPLR) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 266C1 for Channel 265A at Valley City, North Dakota, since it could provide the community with its first local wide coverage area FM service. Channel 266C1 can be allotted to Valley City in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.2 kilometers (5.1 miles) southwest to avoid a short-spacing to Station KBHP, Channel 266C1, Bemidji, Minnesota.[1] Canadian concurrence in the allotment of Channel 266C1 to Valley City has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border. As proposed, we will also modify petitioner's license for Station KOVC-FM to specify operation on Channel 266C1 in lieu of its present Channel 265A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Valley City, North Dakota	266C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Ingstad Broadcasting, Inc. for Station KOVC-FM, Valley City, North Dakota, IS MODIFIED to specify operation on Channel 266C1, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 266C1 at Valley City are North Latitude 46-50-52 and West Longitude 98-03-02. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the applicant may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-474

In the Matter of

Amendment of Section 73.202(b), RM-7355
Table of Allotments,
FM Broadcast Stations.
(Geneva, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Ray-Mar Broadcasting Company (petitioner), licensee of Station WDON(FM), Geneva, Ohio, requesting the substitution of Channel 284A for Channel 285A at Geneva and the modification of its license accordingly. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner requests the channel substitution in order to increase its maximum power from its current 3 kW to 6 kW, pursuant to the rules adopted in MM Docket 88-375, 4 FCC Rcd 6375 (1989). It states that 6 kW operation on Channel 285A would result in a short-spacing to Class A FM Station WZLE, Lorain, Ohio, and Class B Station WQXK, Salem, Ohio. Petitioner believes that it is unlikely that the affected stations would consent to the increase in Station WDON(FM)'s power. However, if the station's license is modified to Channel 284A, petitioner states that there would be no short-spacing to any domestic station. In addition, petitioner notes that its presently authorized 36 kilometer short-spacing to a Canadian allotment at Sarnia, Ontario, would be reduced to 14 kilometers. Petitioner concludes that the substitution of Channel 284A for Channel 285A represents the only realistic opportunity for Station WDON(FM) to increase its power to 6 kW.

3. We believe the public interest would be served by proposing the substitution of Channel 284A for Channel 285A at Geneva, Ohio, since it could enable Station WDON(FM) to expand its coverage area. Channel 284A can be allotted to Geneva in compliance with the Commission's minimum distance separation requirements with a site restriction of 15 kilometers (9.3 miles) west to accommodate petitioner's desired transmitter site. We note that use of this site conflicts with an application (BPH-900228IA) filed by Station WEZE-FM, Pittsburgh, Pennsylvania, to relocate its transmitter and increase power. However, a staff engineering analysis has found an alternate site 12.4 kilometers (7.7 miles) northwest of Geneva which would avoid the conflict.[1] We will serve the licensee of Station WEZE-FM with a copy of this *Notice*. As requested, we also propose to modify petitioner's license for Station WDON(FM) to specify operation on Channel 284A.

4. Geneva, Ohio, is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Pursuant to our analysis of the proposal, we do not believe that there will be prohibited overlap between Channel 284A at Geneva and the allotment of Channel 284A at Sarnia, Ontario, Canada. Therefore, we will request Canadian concurrence in the allotment of Channel 284A as a specially negotiated allotment.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Geneva, Ohio	285A	284A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 20, 1990,** and reply comments on or before **January 4, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kenneth C. Howard, Jr.
Linda R. Bocchi, Esq.
Baker & Hostetler
1050 Connecticut Avenue, N.W., Suite 1100
Washington, D.C. 20036
(Counsel to petitioner)

8. IT IS ORDERED, That a copy of this *Notice of Proposed Rule Making* be sent, by Certified Mail, Return Receipt Requested, to Station WEZE-FM, as follows: Salem Media of Pennsylvania, Inc., 2310 Penderosa Drive 29, Camarillo, California 93010.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte*

presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates requested by the petitioner are North Latitude 41-48-39 and West Longitude 81-07-33. The coordinates of the site proposed by the Commission are North Latitude 41-54-07 and West Longitude 81-01-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-530

In the Matter of

Amendment of Section 73.202(b),	RM-6901
Table of Allotments,	RM-6948
FM Broadcast Stations.	
(Ashdown and DeQueen, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 8296 (1989), issued in response to two separately-filed and mutually-exclusive petitions for rule making. The first petition, filed on behalf of KARQ Radio, Inc. ("KARQ"), licensee of Station KARQ(FM), Channel 221A, Ashdown, Arkansas, requested the substitution of Channel 223C3 for Channel 221A and modification of its license accordingly (RM-6901). Additionally, KARQ requested the substitution of Channel 225A for Channel 224A at DeQueen, Arkansas, licensed to Jay W. and Anne W. Bunyard ("the Bunyards") for Station KDQN-FM, to accomodate the Ashdown modification proposal at its present site. The Bunyards requested the substitution of Channel 225C3 for Channel 224A at DeQueen and modification of the license for Station KDQN-FM accordingly (RM-6948). KARQ and the Bunyards each filed comments in response to the *Notice*. The Harlan Family[1] filed opposing comments with respect to the DeQueen modification proposal. No other comments were received.

2. In its comments, KARQ requests dismissal of its petition for rule making at Ashdown, stating that its business plans have changed, and therefore, it no longer desires to pursue the modification proposal for Station KARQ(FM). Likewise, Bunyards' comments advise that they are no longer interested in pursuing the DeQueen modification proposal for Station KDQN-FM. Therefore, and in accordance with Commission policy, we will grant the petitioners' requests for dismissal of their rule making proposals. *See Grundy Center, IA*, 4 FCC Rcd 1275 (1989). In light of our decision, it is unnecessary to discuss the opposing comments filed in this proceeding.

3. Accordingly, IT IS ORDERED, That the above-described petitions for rule making filed on behalf of KARQ Radio, Inc. (RM-6901), and Jay W. and Anne E. Bunyard (RM-6948), ARE DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The Harlan Family identifies itself as an applicant for a new FM station at Mena, Arkansas.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-475

In the Matter of

Amendment of Section 73.202(b),	RM-7280
Table of Allotments,	RM-7328
FM Broadcast Stations.	
(Dawson and Sasser, Georgia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two conflicting petitions for rule making. The first petition, filed by Dawson Broadcasting Company ("Dawson"), licensee of Station WAZE(FM), Channel 221A, Dawson, Georgia, requests the substitution of Channel 299A for Channel 221A at Dawson, Georgia, and the modification of its license to specify the new class A channel. The second petition, filed by Clyde and Scott/d.b.a. EME Communications ("EME") requests the allotment of Channel 299C3 to Sasser, Georgia. The proposals conflict due to the proposed use of Channel 299A at Dawson and the proposed use of Channel 299C3 at Sasser. Dawson and EME each state an intention to apply for the requested channel, if allotted.

2. In support of its proposal Dawson states that the substitution of Channel 299A for Channel 221A at Dawson, Georgia, would permit Station WAZE to operate with 6 kilowatts at its present site. Dawson also states that WAZE's service to Calhoun County would improve and that Calhoun County has no local transmission service. Dawson states the channel substitution would extend coverage to a greater portion of Terrell County, and help reduce the adjacent channel interference due to the "ducting effect" caused by weather phenomena numerous times during the year in that particular area of southwest Georgia.

3. Channel 299A can be substituted for Channel 221A at Dawson in compliance with the minimum distance separation requirements at Station WAZE(FM)'s licensed site with a site restriction 10.7 kilometers (6.7 miles) southwest.[1] Channel 299C3 can be allotted to Sasser in compliance with the minimum distance separation requirements with a site restriction 8.1 kilometers (5 miles) southwest.[2] Because the proposals are mutually exclusive, we shall provide the proponents an opportunity to demonstrate in comments why their community should receive the requested allotment. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Additionally, the proponents may wish to determine if other channels may be available to resolve the conflict.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No. Present	Proposed
	OPTION I	
Dawson, Georgia	221A	299A
	OPTION II	
Sasser, Georgia	--	299C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 20, 1990,** and reply comments on or before **January 4, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Clyde and Scott/d.b.a. EME Communications Rt. 3, Box 485-C Moultrie, Georgia 31768	John M. Spencer Leibowitz & Spencer 3050 Biscayne Blvd., Suite 501 Miami, Florida 33137 (Counsel for Dawson Broadcasting Co.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 299A at Dawson are North Latitude 31-43-44 and West Longitude 84-20-34.

[2] The coordinates for Channel 299C3 at Sasser are North Latitude 31-40-53 and West Longitude 84-25-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-476

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, (Cordova, Holly Pond and Warrior, Alabama) RM-7343

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making, as amended,[1] filed on behalf of Radio South, Inc. (petitioner), licensee of Station WFFN(FM), Cordova, Alabama, proposing the substitution of Channel 254C3 for Channel 237A[2] at Cordova, and modification of the license for Station WFFN accordingly. In order to accommodate the request in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, petitioner seeks two additional changes to the FM Table of Allotments. Petitioner asks that the Commission substitute Channel 237A for Channel 254A at Warrior, Alabama, an allotment for which six applications are pending, [3] and substitute Channel 260A for Channel 238A at Holly Pond, Alabama, an allotment for which one application is pending.[4] In support of the proposal, petitioner states that the requested substitution at Cordova would enable Station WFFN(FM) to provide enhanced service to Cordova. In further support, petitioner states that Channel 254C3 is the only Class C3 channel available for the proposed upgrade of Station WFFN(FM) at Cordova, provided its own Channel 237A is substituted for Channel 254A at Warrior. Additionally, petitioner submits that the requested substitution of Channel 237A for Channel 254A at Warrior would provide an equivalent channel for operation as a 6 kW facility. Petitioner adds that the Warrior substitution, in turn, requires the substitution of Channel 260A for Channel 238A at Holly Pond, Alabama. Moreover, petitioner claims that if Channel 260A is substituted for Channel 238A at Holly Pond, it would enable a Holly Pond station to operate with maximum Class A facilities of 6 kW, a benefit from which the community is presently precluded. Petitioner provided technical studies to demonstrate that there are no alternate Class A channels available for consideration at either Warrior or Holly Pond. Thus, petitioner asserts that its proposal constitutes an "incompatible channel swap" and should be afforded protection from competing expressions of interest, in accordance with Section 1.420(g)(3) of the Commission's Rules.[5] Otherwise, petitioner states, if competing expressions of interest are entertained for Channel 254C3 at Cordova, its license for Station WFFN(FM) would be at risk.

2. A staff engineering analysis reveals that Channel 254C3 can be substituted for Channel 237A at Cordova provided the transmitter therefor is sited at least 5.4 kilometers (3.4 miles) east[6] to negate a short-spacing to Station WTXT(FM), Channel 251C1, Fayette, Alabama,[7] as well as to the construction permit issued to Station WZLQ(FM), Channel 253C, Tupelo, Mississippi.[8] Channel 237A can be substituted for Channel 254A at Warrior at a site 12.4 kilometers (7.7 miles) west[9] of the community.[10] Channel 260A can be substituted for Channel 238A at Holly Pond at a site 10.1 kilometers (6.3 miles) north[11] to avoid short-spacing to the construction permit issued to Station WZRR(FM), Channel 258C, Birmingham, Alabama,[12] as well as to the construction permit issued to Station WHMA-FM, Channel 263C, Anniston, Alabama.[13]

3. Based upon the information presented by the petitioner, we propose to treat the instant proposal as an "incompatible channel swap," as contemplated by Section 1.420(g)(3) of the Commission's Rules. Therefore, unless commenting parties can demonstrate that the Cordova proposal should be considered otherwise, we will not entertain other expressions of interest in the requested use of Channel 254C3 at that community. We propose to modify the license of Station WFFN(FM) to specify operation on Channel 254C3, as requested.

4. We will also serve a copy of this *Notice* on the applicants at Warrior and Holly Pond. If this proposal is ultimately adopted, the applicants for Channel 254A at Warrior, as well as the applicant for Channel 238A at Holly Pond, will be permitted to amend their applications to specify the new channels. This may be accomplished in each instance without loss of "cut-off" status since the channels are of an equivalent class. *See Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, FL*, 50 FR 32706 (1985).

5. In view of the above, we consider it appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Cordova, Alabama	237A	254C3
Holly Pond, Alabama	238A	260A
Warrior, Alabama	254A	237A

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 238A at Holly Pond, Alabama, as follows: Good Earth Broadcasting, Inc. P.O. Box 968 Cullman, AL 35056, and to the applicants for Channel 254A at Warrior, Alabama, as listed below:

Teresa B. Lowry
Fifth Avenue, West
Oneonta, AL 35121

G. Dean Pearce
1169 Northwood Lake
Northport, AL 35476

Media Enterprises of Warrior, Inc.
722 New Hill Way
Bessemer, AL 35020

Warrior Communications
4-F Northwood Townhomes
Jasper, AL 35501

Ross Broadcasting Company, Inc.
524 Broadway
Birmingham, AL 35209

Henry S. Granger, Jr.
1116 Ladonna Drive
Birmingham, AL 35235

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 20, 1990,** and reply comments on or before **January 4, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Erwin G. Krasnow, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 - 15th Street, N.W.
Washington, D.C. 20005-2301

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner's amended proposal is intended to clarify its mutually-exclusive relationship with other aspects of its request.

[2] Petitioner is presently operating on Channel 225A at Cordova. However, it was modified to Channel 237A in MM Docket No. 87-451. *See* 3 FCC Rcd 6849 (1988). Petitioner has filed an application for a construction permit to operate on Channel 237A. *See* File No. BPH-890510IB.

[3] The applicants at Warrior are Teresa B. Lowry (File No. 891214MJ), G. Dean Pearce (File No. 891215MO), Media Enterprises of Warrior, Inc. (File No. 891218MG), Warrior Communications (File No. 891218MH), Ross Broadcasting Company, Inc. (File No. 891218MI) and Henry S. Granger, Jr. (File No. 891218MJ).

[4] The applicant at Holly Pond is Good Earth Broadcasting, Inc. (File No. 900122NT).

[5] Section 1.420(g)(3) of the Commission's Rules allows the modification of a station's license (or permit) to a higher class channel if the proposal involves a co-channel or adjacent channel that is mutually exclusive with the existing license. The Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually-exclusive relationship required under Section 1.420(g)(3), and determined to consider such "incompatible channel swaps" on an individual basis. *See Modification of FM Broadcast License to Higher Class Co-channel of Adjacent Channels,* 60 RR 2d 114 (1986).

[6] Coordinates used for Channel 254C3 at Cordova are 33-46-38 and 87-07-45.

[7] Coordinates at the site specified in the modified construction permit (BMPH-890609IF) issued to Station WTXT(FM) at Fayette are 33-19-17 and 87-46-29.

[8] Coordinates at the site specified in the construction permit (BPH-870302ND) issued to Station WZLQ(FM) at Tupelo are 34-23-52 and 88-53-03.

[9] Coordinates used for Channel 237A at Warrior are 33-48-14 and 86-56-38.

[10] The Warrior site restriction is required to meet the minimum distance separation requirements to Station WNDA(FM), Channel 236C2, Huntsville, Alabama, at coordinates 34-42-56 and 86-35-55, as well as to Station WASZ(FM), Channel 237A, Ashland, Alabama, at coordinates 33-18-30 and 85-50-58.

[11] Coordinates used for Channel 260A at Holly Pond are 34-15-40 and 86-35-12.

[12] Coordinates at the site specified in the construction permit (BPH-870227NB) issued to Station WZRR(FM), Birmingham, are 33-26-28 and 86-53-00.

[13] Coordinates at the site specified in the construction permit (BPH-890803JP) issued to Station WHMA-FM, Anniston, are 33-37-38 and 85-53-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-515

In the Matter of

Amendment of Section 73.202(b), RM-6898
Table of Allotments,
FM Broadcast Stations.
(Clarkesville, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 29, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Clara Morris Martin (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8180 (1989), proposing the substitution of Channel 275C3 for Channel 275A at Clarkesville, Georgia, and the modification of her construction permit for Station WMJE(FM) to specify operation on the higher class channel. Petitioner filed comments stating her intentions to apply for the channel, if allotted. Cherokee Broadcasting Co., Inc ("Cherokee"), permittee of Station WCNG, Channel 274A, Murphy, North Carolina, filed reply comments.

2. In reply comments, Cherokee states that although there is apparently a minor short-spacing of 6.3 kilometers (3.9 miles) between the petitioner's proposed Class C3 allotment and the transmitter site proposed in Cherokee's pending application,[1] Section 73.215 of the Commission's Rules allows stations to be short-spaced, provided that they install directional antennas to protect other stations from electrical interference. Cherokee contends that petitioner could install a directional antenna to protect the transmitter site specified in Cherokee's application. Cherokee also states that if the Clarkesville allotment can be made without a short-spacing to the Murphy reference points, both stations could still operate at the transmitter sites proposed pursuant to the provisions of Section 73.215 of the Rules.

3. Based on the information before us, we believe the public interest would benefit from the substitution of Channel 275C3 for Channel 275A at Clarkesville. On August 3, 1990, Cherokee's application was granted pursuant to Section 73.215. Cherokee's construction permit provides the protection required by Section 73.215 to the petitioner's proposed upgrade.

4. Channel 275C3 can be allotted to Clarkesville in compliance with the minimum distance separation requirements of the Commission's rules with a site restriction of 12.3 kilometers (7.7 miles) south of the community.[2] As proposed, we will also modify the construction permit for Station WMJE(FM) to specify operation on the higher class channel.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Clarkesville, Georgia	275C3

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WMJE(FM), Clarkesville, Georgia, IS MODIFIED, to specify operation on Channel 275C3 in lieu of Channel 275A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *See* File No. BMPH-900319JU (granted August 3, 1990).

[2] The coordinates for this allotment are North Latitude 34-30-00 and West Longitude 83-30-00. Because the petition for rule making in this proceeding was filed prior to October 2, 1989, petitioner may avail itself of the provisions of Section 73.213(c)(1) of the Commissions Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-309

In the Matter of

Amendment of Section 73.606(b), RM-5807
Table of Allotments,
Television Broadcast Stations.
(Montrose and Scranton, Pennsylvania)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1990; Released: October 29, 1990

By the Commission:

1. The Commission has before it an application for review filed by Christian Discerner, Inc. ("Discerner") that seeks review of the *Memorandum Opinion and Order* ("*MO&O*) in this proceeding, 4 FCC Rcd 7799 (Pol. & Rules Div. 1989). The *MO&O* denied Discerner's petition for reconsideration of the *Report and Order* (" *R&O* "), 3 FCC Rcd 1061 (Pol. & Rules Div. 1988), which had denied Discerner's request for reallotment of vacant UHF television Channel 64 from Scranton, Pennsylvania, to Montrose, Pennsylvania, as that community's first local television service. An applicant for Channel 64 in Scranton (BPCT-870616KH), Ted H. Ehrhardt, Jr. d/b/a Ehrhardt Broadcasting ("Ehrhardt"), filed an opposition to Discerner's application for review.[1]

BACKGROUND

2. The staff's *R&O* had denied Discerner's petition for rule making to delete vacant Channel 64 from Scranton and to reallot it to Montrose. The staff did so because two applications for the use of Channel 64 in Scranton had already been filed and were granted cut-off protection almost two months before the release of the *Notice of Proposed Rule Making* (" *Notice* ") in this proceeding, 2 FCC Rcd 5087 (Pol. & Rules Div. 1987).[2] Furthermore, in comparing the relative merits of Scranton and Montrose, the staff could not find the latter community more deserving of that allotment. While the staff indicated that Discerner had shown that Montrose is a community that could be considered as meriting its own local television service, its status as a county seat without local television service was insufficient to override a more compelling Commission policy. That policy is not to reallot a channel where significant interest in retaining the allotment has been expressed, such as the filing of applications to operate a station on that channel.

3. On reconsideration of the *R&O*, the staff affirmed its denial of Discerner's petition and restated the long-standing policy that a channel will not be reallotted "when interest has been expressed in operating a station on that channel, absent a compelling reason for the reallotment." In restating this policy, the staff cited *Fond du Lac and Sheboygan, Wisconsin*, 55 RR 2d 592, 594 (Pol. & Rules Div. 1984) (" *Fond du Lac* "). In response to Discerner's claim that it was error for the Commission to adopt cut-off dates for those applications once its mutually exclusive petition for rule making was on file, the staff disagreed, noting that no notice of proposed rule making had then been issued. In any event, the staff stated, had it not overlooked the filing of the applications evidencing an interest in the Scranton allotment, it likely would not have issued a notice of proposed rule making.

4. Discerner had also claimed that it was entitled to equitable relief because the grant of cut-off status allegedly prevented it from filing an application for Scranton, while it was simultaneously precluded from applying for authorization in Montrose because of the *R&O*'s denial of its allotment proposal there. The staff found no basis for the equitable relief requested or anything unique about this proceeding to justify the fashioning of any other equitable remedy. The staff noted that the relief requested by Discerner, which would permit applicants to file for any community within a 30-mile radius of Scranton, was "starkly inconsistent" with the Commission's current policy. In Docket No. 82-320, the Commission deleted the rule that had permitted applicants to file for any community within a 15-mile radius [3] of a community already in the Table of Allotments. *See Report and Order*, 93 FCC 2d 436, 451-453 (1983). The staff pointed out in the *MO & O* that the Commission in Docket No. 82-320 had considered it more efficient and less costly to resolve such Section 307(b) issues in a rule making proceeding. *Report and Order, supra*, 93 FCC 2d at 452.

THE PLEADINGS

5. Discerner states that the basis under Section 1.115(b)(ii) of the Commission's Rules for its application for review is that "its proposed equitable relief presents a question of law which has not previously been resolved by the Commission." Discerner cites as novel its proposal, rejected on reconsideration, that the Commission allow applications to be filed for any community within a 30-mile radius of Scranton, which would include Montrose. That is, Discerner requested that applications be accepted *nunc pro tunc* and considered along with applications for the channel allotted to Scranton, thus qualifying Discerner's contemplated application for Montrose as mutually exclusive with the already cut-off applications for Scranton. Whether an allotment to either community or to any other would best serve the public interest under Section 307(b) of the Communications Act of 1934, as amended, could then be resolved in a hearing addressing the comparative merits of the applications for Scranton, Montrose, or any other community, claims Discerner. As it did in its petition for reconsideration, Discerner notes that there is precedent for the equitable relief, citing the prior routine handling of such questions in a hearing context under the now discarded "15-mile rule." In the present case, Discerner alleges that the staff avoided the 307(b) issue of which community is more deserving of the allotment.

6. Finally, Discerner cites Ehrhardt's application to reduce power from 5000 kilowatts to 8 kilowatts as " *prima facie* evidence" of Ehrhardt's intention not "to construct as proposed." Since such a "minimal sub-standard" facility does not advance the public interest, urges Dis-

cerner, the Commission policy not to reallot where an interest has been expressed in the channel should not apply. Discerner points out that the staff in its *MO&O* stated that it would consider deviating from this policy if a petitioner shows that an application had been filed purely for reasons other than to provide service to the public. Discerner claims that its reference to Ehrhardt's proposed modification constitutes such a showing.

7. In opposition, Ehrhardt argues that Discerner's application for review does not present the Commission with a novel question of law, but instead seeks to revive its rejected call for equitable relief, a proposal that is inconsistent with the principles underlying the Commission's abrogation of the "15-mile rule." Under those principles, Ehrhardt notes, the Commission makes Section 307(b) determinations in the context of rule making proceedings. Ehrhardt further notes that Discerner's request for an equitable remedy failed to demonstrate that it was prejudiced by anything other than its own inaction in failing to file an application for Scranton. Ehrhardt asserts that if Discerner had filed, it could have sought to serve Montrose (in addition to Scranton) or to have the channel reallotted to Montrose once authorization was granted in Scranton.

8. Ehrhardt argues that the staff correctly followed precedent by retaining the Channel 64 allotment to Scranton because of the filing of "two *bona fide* applications" to operate on that channel. Ehrhardt also argues that the staff performed the required Section 307(b) analysis in the *R&O* of the Montrose allotment proposal. He quotes the staff's comparative analysis of the two communities, which states that the retention of the applied-for channel at Scranton outweighs any preference that might be due Montrose on the grounds that it would provide a first local service. Turning to Discerner's questioning of Ehrhardt's application to modify its Scranton facilities, Ehrhardt argues that such "changes are irrelevant to allotment decisions." Ehrhardt states, nevertheless, that the proposed modification would "insure the long-term financial viability of the station" by allowing it to start with "more modest facilities than originally proposed." Ehrhardt asserts that Discerner's allegations have no substance because the modification is a "minor change" and, as modified, the station would still provide a city-grade signal over the entire city of license and "cover substantial territory." Therefore, Ehrhardt argues that Discerner has given no valid reasons to overturn the *MO&O* and that its application for review should be denied.

DISCUSSION

9. We will deny Discerner's application for review. We believe that the staff correctly applied the Commission's long-standing policy not to reallot a channel in which interest has been expressed, absent a compelling reason to do so. *See, e.g., Snow Hill and Kinston, North Carolina*, 55 FCC 2d 769 (1975); *Red Oak, Iowa*, 46 FCC 2d 344 (1974); *Fond du Lac and Sheboygan, Wisconsin, supra*; *Martin and Salyersville, Kentucky*, 50 R.R. 2d 502 (Pol. & Rules Div. 1981). We agree with the staff that Discerner has not provided the requisite basis for deviating from this policy. The policy reflects the Commission's view that one critical aspect of implementing the mandate of Section 307(b) of the Communications Act is to provide an efficient allotment system that affords prospective applicants reasonable certainty and administrative finality in seeking to initiate service. In short, the "fair distribution" of service analysis which underlay the original allotment decision should not be disturbed where an active interest in providing service exists. While Discerner contends that the reallotment of Channel 64 would result in a first local television service to Montrose, we do not believe that the provision of a first local television service is a sufficiently compelling reason for making the reallotment in this case. We note that there is no replacement channel available for Scranton and we have, at this point in the proceeding, a permittee for Channel 64 that will be able to activate a long-vacant channel. In this case, the value of a first local service is attenuated given the relatively small size of Montrose (population 1,980). Under these circumstances, the public interest is better served by retaining the channel at Scranton than realloting it to the smaller community of Montrose, which already receives television service from several of the Binghamton, New York, and Scranton television stations.

10. We also agree with the staff that there is no basis for the "equitable" relief requested by Discerner -- that is, considering in a comparative hearing, as opposed to a rule making, the question of whether Montrose or Scranton has the greater need for Channel 64 under Section 307(b) of the Communications Act.[4] To do as Discerner requests would require that we permit parties to file applications for television channels for communities within 30 miles of the community to which a channel is allotted. However, we explicitly eliminated this approach in Docket No. 82-320, in which we repealed our "15-mile rule," which had permitted the filing of an application for a television channel at any community located within 15 miles of the community to which a channel is allotted. Therein, we decided that such determinations made in a hearing were often time-consuming and inefficient with no offsetting public benefit. Instead, we endorsed the kind of analysis the staff conducted in this proceeding. The Commission believed then that the issues raised could be handled more efficiently in a rule making proceeding. *Report and Order, supra* at 452. We continue to believe that this is a valid approach, and Discerner has provided no basis for deviating from this policy. Likewise, Discerner has not demonstrated why our policies and rules created a hardship for Discerner that would warrant equitable relief. On the contrary, it could have filed an application for Channel 64 at Scranton and sought to provide service to both Scranton and Montrose.

11. Finally, we do not believe that Ehrhardt's filing of an application to reduce substantially his proposed facilities for Scranton is a sufficient basis, in and of itself, to abandon our policy of not reallotting a channel for which applications have been filed. Discerner has failed to make an adequate showing under the guidelines noted in the staff's *MO&O* that Ehrhardt's application was not legitimate or was filed in bad faith.[5] Moreover, concerns that allegedly sub-standard facilities would not serve the public interest are, as a general matter, more appropriately considered at the application stage. In this case, the staff will fully evaluate the adequacy of Ehrhardt's proposed facilities in disposing of his application to modify his construction permit. *See* note 1, *supra*.

12. Accordingly, IT IS ORDERED That the Application for Review filed by Christian Discerner, Inc. IS DENIED.

13. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Ehrhardt's application for construction permit was granted by letter of May 5, 1988, which also approved a joint settlement agreement between Ehrhardt and Robin C. Brandt ("Brandt"), who had filed a competing application for Channel 64 on March 31, 1987 (BPCT-870331K6). As a result of the settlement, Brandt's application was dismissed, and Ehrhardt's application was granted. Ehrhardt subsequently filed an application (BMPCT-890720KE) to modify its construction permit, seeking to reduce its power from 5000 kilowatts to 8 kilowatts (and to increase its antenna height above average terrain from 368 to 374 meters). By letter of February 27, 1990, the staff questioned whether such a reduced power facility would serve the public interest. Ehrhardt responded that it would and that its proposal, if granted, would still serve 524,527 persons within its Grade B contour, as well as place a city-grade signal over all of Scranton. He also stated that, in his business judgment, the station's long-term viability could be better assured by operating initially with such reduced facilities, and later operating at full power. That application is still pending.

[2] Discerner filed its petition for rule making on March 13, 1987. On March 31, 1987, Brandt filed her application and it was accepted for filing by Public Notice dated May 12, 1987 (Report No. A-130), which set a cut-off date of June 16, 1987 for the filing of competing applications. Ehrhardt filed his application on June 16, 1987, which was accepted for filing by Public Notice of August 5, 1987 (Report No. B-138). The *Notice* was released on August 18, 1987.

[3] Under the former "15-mile rule", all applicants specifying a community within 15 miles of a community specified in the Table of Allotments were deemed mutually exclusive and considered together. The Section 307(b) question of which of these communities should prevail was addressed in the hearing on the applications.

[4] Section 307(b) mandates that the Commission make a "fair, efficient, and equitable distribution" of licenses and frequencies among the states and communities. *See* 47 U.S.C. § 307(b).

[5] *See Memorandum Opinion and Order,* 4 FCC Rcd at 7800, n.1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VITELCOM
CELLULAR, INC.,
Complainant,

v. File No. E-90-39

CARIBBEAN
CELLULAR
TELEPHONE,
LTD d/b/a
CCT BOATPHONE
Defendant.

CARIBBEAN
CELLULAR
TELEPHONE,
LTD d/b/a
CCT BOATPHONE
Complainant,

v. File No. IC-90-00775

VITELCOM
CELLULAR. INC.,
Defendant.

ORDER

Adopted: October 17, 1990; Released: October 26, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 3, 1989, Caribbean Cellular Telephones, Ltd., d/b/a CCT Boatphone ("CCT"), filed the above captioned informal complaint which alleged that Vitelcom Cellular, Inc. ("Vitelcom") had refused to allow CCT to resell Vitelcom's cellular services. On November 7, 1989, Vitelcom filed the above captioned formal complaint against CCT, alleging violations of §§ 202, 203 and 214 of the Communications Act, 47 U.S.C. §§ 202, 203 and 214. In the formal complaint, Vitelcom alleged that CCT resold international service without §214 authorization and without filing a tariff required under Section §203 and alleged that CCT engaged in unlawful discrimination, in violation of § 202, by refusing to allow Vitelcom to resell CCT's service. CCT denied the allegations raised in the formal complaint. On April 24, 1990, CCT supplemented its informal complaint and further alleged that Vitelcom's rates and charges for resellers were unlawful and discriminatory and that the conduct of Vitelcom's affiliate, Maritime Cellular Network, was illegal and unlawful. Vitelcom disputed the allegations in CCT's informal complaint. By joint motion filed September 27, 1990, the parties advised the Commission that they had reached a mutually satisfactory settlement and requested that both the formal and informal complaints be dismissed with prejudice.

2. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion for dismissal of the above-captioned complaints IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

ACHERNAR BROADCASTING COMPANY — File No. BPCT-860410KP

LINDSAY TELEVISION, INC. — File No. BPCT-860410KQ

For Construction Permit
for a New Television Station,
Channel 64,
Charlottesville, Virginia

Appearances

Margot Polivy, on behalf of Achernar Broadcasting Company; *Gene A. Bechtel*, on behalf of Lindsay Televsision, Inc.; *Christopher J. Reynolds*, on behalf of the National Radio Astronomy Observatory; and *Larry A. Miller*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: October 16, 1990; Released: October 30, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, AND ESBENSEN. Board Member BLUMENTHAL:

1. This proceeding is before the Review Board for a second time pursuant to the Supplemental Initial Decision (*S.I.D.*) of Administrative Law Judge Joseph Chachkin (ALJ), 5 FCC Rcd 962 (1990), which denied both remaining applications because a grant to either would render Channel 64 unusable to the National Radio Astronomy Observatory (NRAO). Both applicants, Achernar Broadcasting Company (Achernar) and Lindsay Television, Inc. (Lindsay), have filed exceptions, as has the Mass Media Bureau; only NRAO (in a partial reversal of its prior position) supports the ALJ's result. Upon review of the pleadings, the hearing record as supplemented, and the oral argument held September 14, 1990, we adopt the ALJ's findings of fact, but conclude that neither applicant should be disqualified. Instead, under the designated comparative issue, we hold that a grant of Lindsay's application would best serve the public interest.

BACKGROUND

2. Achernar was originally disqualified by the ALJ in his Initial Decision (*I. D.*), 3 FCC Rcd 5421 (1988), under the following issue[1]:

> To determine whether there is a reasonable possibility that operation by Achernar as proposed would result in objectionable interference to the conduct of radio astronomy activities by the National Radio Astronomy Observatory in the West Virginia "Quiet Zone."

In its exceptions, Achernar argued that although Lindsay, the original winner below, would transmit from outside the Quiet Zone, whereas Achernar would transmit from inside the zone, both applications would cause an equal amount of interference and thus render channel 64 unusable to NRAO. In support of its position, Achernar relied on its hearing Exhibit 6, prepared by its consulting engineer, which the ALJ had only permitted into the record as an offer of proof. The Board directed the parties to comment on "the accuracy of Achernar Exhibit 6 and . . . Achernar's deductive representations that purportedly derive therefrom." *Order*, 4 FCC Rcd 829 (Rev. Bd. 1989). Upon review of the comments submitted, we found that the question underlying Achernar's claim remained unanswered. Thus, and in order "to avoid an anomalous public interest result which could obtain if, in fact, the detrimental impact on the Quiet Zone, which it is the Commission's policy to minimize, would be effectively the same no matter which application is granted in this proceeding: *viz.*, the practical elimination of Channel 64 as a usable radio astronomy frequency," we remanded the proceeding on the following issue:

> To determine whether the electrical interference to be caused by Achernar, or Lindsay, or both would render Channel 64 equally unusable to NRAO for its radio astronomy purposes.

Memorandum Opinion and Order, 4 FCC Rcd 3629, 3630-3631 (Rev. Bd. 1989), *Remand Order)*. In his *S.I.D.*, the ALJ answered the remanded question in the affirmative; but he went beyond the designated issue, revisited *sua sponte* his original award to Lindsay, and denied both applications. [2]

THE QUIET ZONE ISSUE

3. The ALJ concluded that both applicants would greatly exceed the amount of interference acceptable to NRAO at the Green Bank facility. Specifically, Achernar will exceed the NRAO limit by 65, 013 times, whereas Lindsay would exceed the NRAO limit by 22,856 times. The only difference in the proposals was slight, the ALJ found, in that Achernar's signal would cause a greater range of interference precluding use of 768-778 MHz, whereas Lindsay would preclude use of 769-777 MHz. *S. I. D.*, paras. 49-51. The ALJ concluded that the public interest would best be served by protecting use of 770-776 MHz (Channel 64) for NRAO's radio astronomy activities in the Quiet Zone, and that neither Achernar nor Lindsay had submitted any evidence of offsetting public interest

benefits that would flow from a grant of either application, even if conditioned so as to permit some use by NRAO. *Id.*, at paras. 62-63.

4. In its exceptions, Lindsay, which supported the original *I.D.*, argues that the *S.I.D.* in effect illegally deletes Channel 64 from the television table of assignments (*see* 47 CFR § 73.603) without benefit of a Rule Making proceeding. It also contends that the Board (by virtue of its remand order) and the ALJ have acted *ultra vires* and contrary to Commission practice of thirty years by for the first time denying an application proposing facilities located outside the Quiet Zone. Lindsay points out that no issue was designated against it by the Commission, because it met the protection requirements for the zone. It further argues that Achernar should be disqualified for its location in the Quiet Zone and Lindsay granted, as originally proposed in the *I.D.*, but that even if entitled to comparative consideration, Achernar should not be awarded a coverage preference (which it claims) on the basis of superior service to areas and populations which do not have substantial television service as a direct result of the Commission's policy of affording protection to the Quiet Zone. Finally, Lindsay argues that the interference caused by Lindsay and Achernar is not fully equatable because Achernar will place three times the effective radiated power over the Observatory as will Lindsay.

5. Achernar, whose engineering objections led to the remand, now argues that the *S.I.D.* went well beyond its intended purpose, once it was concluded that a grant of either application would preclude NRAO use of Channel 64 while either television transmitter was operating. The ALJ's further conclusion, Achernar maintains, that denial of the applications is essential to protect NRAO was impermissible outside the context of a Commission Rule Making. Achernar submits that the Commission's Quiet Zone policy is intended not only to minimize interference to NRAO's operations, but to maintain broadcast service as well, citing *Report and Order, Protection of Radio Astronomy Frequencies*, 17 RR 1738 (1958). Furthermore, Achernar alleges that NRAO almost never observes on Channel 64, citing as an example a single observation extending over two days in 1988. It further states that NRAO concedes shared use is feasible, and that Achernar is amenable to such a solution. Achernar concludes that because there is no relevant distinction between the applicants under the Quiet Zone issue, the case should be decided under the standard comparative issue, pursuant to which Achernar is entitled to a substantial coverage advantage and to grant of its application.

6. The Bureau now takes the position that, while it agrees with the *S.I.D.* that both applicants would cause unacceptable interference to NRAO, it disagrees that denial of both is appropriate. It contends that a conditional grant can accommodate the needs of NRAO while allowing a new television service in Charlottesville. Specifically, it alleges that in rejecting a shared use of the channel, the ALJ ignored or minimized evidence concerning the scope and nature of NRAO's use of Channel 64, *i.e.*, 770 MHz to 776 MHz. For example, the Bureau states, it generally takes several months from the date a proposal for use of the NRAO telescope is submitted until actual use takes place. In addition, it claims, research on certain phenomena such as supernovas or comets does not require the 770 MHz to 776 MHz frequency band. The Bureau also notes that any heavenly object which is the subject of research may be viewed between the hours of midnight to 6:00 a.m. Further, the Bureau states, it appears from the testimony of Dr. George Seielstad, director of NRAO's Green Bank operations, and Dr. Robert Brown, who has used the NRAO telescope in recent years for study in the 750 MHz to 1000 MHz range, that it is unnecessary for astronomers to use the frequency full-time in order to make an important scientific discovery. In sum, the Bureau submits that the winning application should be conditioned so as to require the station to make Channel 64 available to NRAO between midnight and 6:00 a.m. upon thirty days notice.

7. For its part, NRAO, which supported the original *I.D.'s* denial of Achernar and grant to Lindsay, now is of the view that both applications should be denied and the *S.I.D.* affirmed without modification. It disputes the applicants' contentions that denial of their applications converts this licensing proceeding into a Rule Making proceeding, and argues that the ALJ's result is consistent with Commission precedent protective of the Quiet Zone, citing *Report and Order in Docket No. 16991 (Harrisonsburg, Va. et. al.)*, 6 FCC 2d 793 (1967), where the Commission deleted seven FM allotments within the zone, and *First Report and Order in Docket NO. 20954 (Amherst, Va.)*, 43 RR 2d 1989 (1978), where the Commission allotted an FM channel to Amherst, Virginia, on condition that the transmitter site be located outside the zone, despite the fact that superior coverage would have resulted from another site within the zone. In addition, NRAO posits that, unlike past cases, such as *Report and Order on Docket No. 16882 (Staunton, Va.)*, 5 FCC 2d 537 (1966), where adjustments have been made by broadcasters to eliminate interference, here there was no showing that there were no other available transmitter sites, or other accommodations that could be made to protect the Quiet Zone. Finally, NRAO also opposes any plan for shared use of the channel, such as that proposed by the Bureau, arguing that this would be impractical and burdensome on it, and would drastically reduce the amount of observation time available to radio astronomers. In this regard, Lindsay, too, opposes any sharing of the frequency with NRAO. It contends that no Commission rule authorizes a shared use, and that such a result would be unfair to Lindsay whose application accorded with the Quiet Zone protections.

8. In the Board's view, both sides have somewhat overstated the legal proposition before us in this case. That is, NRAO, and the ALJ, in both his *I.D.* and *S.I.D.*, seem to adhere to the position that only an absolute grant or denial of one or both applications can satisfy the Commission's policy regarding the Quiet Zone and serve the public interest. On the contrary, the Commission's policy, as expressed over thirty years ago, is that it is "in the public interest to provide maximum practicable protection from interference to radio astronomy measurements at Green Bank . . . without unduly disrupting existing radio services." *Report and Order, Protection of Radio Astronomy Frequencies, supra*, 17 RR at 1739. The Quiet Zone Rule, 47 CFR 73.1030(a), is not by its terms a "go/no go" provision calling for automatic grant or denial, but provides only a mechanism for NRAO to comment upon or object to proposals to operate broadcast stations within the zone. It is then the Commission's obligation, pursuant to the Rule, to "consider all aspects of the problem and take whatever action is deemed appropriate." Achernar and Lindsay are thus both quite incorrect in suggesting that the Board's *Remand Order* amounted to

an invitation to the ALJ to engage in impermissible Rule Making deleting Channel 64 from broadcasting use and to ultimately deny both applications. Rather our purpose in remanding was to ensure, in light of Achernar's exceptions pertaining to the implications of its hearing Exhibit 6, that "all aspects of the problem" were considered so that the most "appropriate" action could be taken in the context of this case consistent with Commisison policy. While it is clear from the cases involving channel assignments in or near the Quiet Zone, such as those cited by NRAO (para. 7, *supra),* that the Commission has made FM and TV assignments and even deleted assignments in Rule Making proceedings, where such actions were necessary to protect the astronomical work being done by NRAO, *see, e.g., Report and Order in Docket No. 18259 (Harrisonburg, Va.),* 14 FCC 2d 814 (1968), the more precise question before us, however, is what public interest result is appropriate in the context of this unprecedented comparative licensing proceeding.

9. The ALJ found (*S.I.D.*, para. 54), and no party disputes, that this is a novel proceeding in that it involves a choice between mutually exclusive applicants, one proposing a site within the Quiet Zone and one outside the zone, either of which would preclude use of the requested frequency by NRAO. This is so because the record, as now supplemented, establishes beyond peradventure that both applicants would exceed by a factor of many thousands the acceptable level of interference to NRAO at its Green Bank facility and thus render Channel 64 unusable for astronomical purposes during the time either of their transmitters was operating. *S.I.D.*, para. 49. In light of this key undisputed finding, the somewhat greater extent of spectrum interference caused by Achernar is not significant, nor, in view of the equally preclusive effect on NRAO of both proposals, is Lindsay's point that Achernar will cause three times as much interference. On the other hand, the record is not nearly so persuasive regarding the actual need of NRAO for the particular Channel 64 frequency in question. In fact, NRAO has made only limited use of Channel 64 in the past and in effect concedes it is not needed on a 24 hour a day, 365 day a year basis in order to achieve important scientific discoveries. *See S.I.D.*, para. 56; Tr. 1359-1360; 1396-1397, 1402. As Dr. Seielstad, NRAO's Green Bank director of operations, testified, "[t]he quality and quantity just don't straightforwardly equate . . . . It wasn't the length of time that went into it; it was sort of the newness of the discovery. So, it's very hard to say if someone worked six days and produced a result, it can't be as good as someone who has worked on it year after year after year. That just does not follow." Tr. 1389. At present, NRAO uses the frequency an average of only twenty days a year. As was stated at Oral Argument:

> [Board Member]: What does the record show of the frequency of usage of 770 to 776 MHz by your client at present?
>
> [Mr. Reynolds]: The record shows that we have used it as much as, on the average, twenty days per year. There have been some years when it wasn't used at all and there were some years when it was used more than twenty days, but that seems to be a record fact that's roughly the average use.

Oral Arg. Tr. 1599; Tr. 1387, 1393, 1407-1409; *S. I. D.*, para. 17, n.2. In light of this rather modest usage, NRAO's objections to even a shared use of the frequency, as suggested by the Bureau, because such use would reduce its potential observation time by 75%, falls far wide of the mark and is of little assistance in advancing a meaningful public interest result.

10. As we said in our *Remand Order*, our purpose here is to avoid an anomalous public interest result. Such a result would obtain, we believe, from denial of either or both applications. That is, to eliminate Achernar under the Quiet Zone issue, and thereby grant Lindsay by default, would negate the whole point of the hearing since the very reason for disqualifying Achernar, *viz.*, the adverse impact on NRAO's operations, would apply with equal force to Lindsay. Of course, the situation would be quite different if Achernar were the only applicant here; then, disqualification would be much more feasible, absent some accommodation with NRAO. *Cf. Report and Order in Docket No. 16882 (Staunton, Va.), supra ; Report and Order in Docket No. 18259 (Harrisonburg, Va.), supra.* Similarly unpalatable would be Lindsay's disqualification, for it must be borne in mind that the designated issue pertains only to Achernar and that, contrary to the assumption evidently made by the ALJ, the Board's *Remand Order* did not add a Quiet Zone issue against Lindsay, but only an issue to determine the accuracy of Achernar's claim, based on its hearing Exhibit 6, that the same interference would result from both proposals. Indeed, we have serious reservations, in view of the narrow language of 47 CFR § 73.1030(a), and the absence of Commission guidance on this novel point, that the Board, as a matter of first impression, could add an issue against or deny an applicant whose location is outside the bounds of the Quiet Zone. Again, by analogy to a single applicant proceeding, if Lindsay were the only applicant here, it would have been routinely granted since NRAO made no objection to its proposal initially. Finally, we emphasize the testimony and concessions of NRAO itself in this proceeding. Specifically, NRAO has not supported its claim that it needs the frequency full-time; indeed, the record shows that it only uses it now twenty days a year and provides no reasonable basis to draw the inference that its future use would be significantly greater. In light of these facts, NRAO's objections to any broadcast use of Channel 64, which we have duly considered under 47 CFR § 73.1030(a), are attenuated and unconvincing. In short, in this unique comparative proceeding, we believe the public interest is best served by permitting both applicants to go forward and deciding this case under the standard comparative issue.

COMPARATIVE ISSUE

11. The ALJ awarded both Achernar and Lindsay 100% quantitative integration credit based on the proposals of their respective controlling owners, Margot Polivy and George Walton Lindsay, to work full-time as general managers of the new facility. Lindsay was favored, however, because his proposal was enhanced by long-term local residence and civic involvement which, the ALJ found, outweighed Achernar's credits for female participation and Ms. Polivy's commitment to future service area residence. *I.D.*, paras. 86, 88, 89, 94. The ALJ declined to assess a diversification demerit against Lindsay based on his ownership of Lindsay Publishing, a division of

Kerster-Williams Newspaper Services, Inc. (K-W), which publishes two weekly newspapers in North Carolina, *The Yadkin Enterprise*, a free newspaper (circulation 12,000-16,000) and the *King Times-News*, a subscription newspaper (paid circulation 4,500). The ALJ also found that K-W's distribution of a general, inspirational, non-denominational religious feature to newspapers in forty states for placement in their weekly religious page did not impact on Lindsay's diversification standing. *I.D.*, paras. 82-83. He also refused to award Achernar a comparative coverage preference for providing superior second or "gray" area service to 15, 244 people compared to 3,900 by Lindsay, and better third and fourth service, as well as overall coverage to areas and populations, because these advantages were the result of Achernar's location within the Quiet Zone. *I.D.*, para. 92-93. The ALJ concluded that Lindsay was the preferred comparative applicant. *I.D.*, para. 94.

12. Achernar argues that if it is entitled to comparative consideration it is entitled to credit for its superior coverage proposal because it was made in good faith, citing *KIST Corp*, 102 FCC 2d 288, 292 n.9 (1985). It also contends that Lindsay should be assessed a diversification demerit because of its ownership of a weekly newspaper religious feature which is widely read, citing *Daytona Broadcasting Co., Inc.*, 99 FCC 2d 212, 224 (Rev. Bd. 1984). Finally, Achernar claims that Lindsay is entitled to no more than "substantial time" integration credit (thirty hours a week) because of his continuing involvement in his publishing activities, and that Achernar is in any case superior on the basis of its qualitative enhancements.

13. We will affirm the ALJ's comparative analysis. Looking first to comparative coverage, we would agree with Achernar that, in ordinary circumstances, its proposal, which includes its provision of a second broadcast service to approximately 11,000 more persons than Lindsay, would garner at least a moderate coverage preference. *See Christian Broadcasting of the Midlands, Inc.* 99 FCC 2d 578, 582-583 (Rev. Bd. 1984), *rev. denied*, 103 FCC 2d 375 (1986); *FBC, Inc.*, 95 FCC 2d 256 (Rev, Bd. 1983), *rev. denied*, FCC 85-309, released June 14, 1985. As stressed earlier, however, this is a unique case and, as the ALJ correctly found, the only reason Achernar is able to claim a coverage advantage is because, except for Channel 51 in Staunton, Virginia, it is the only television applicant in the thirty years since the creation of the Quiet Zone to place its transmitter site within the zone. The Commission authorized the Staunton educational station only because the applicant there had reached agreement with NRAO to operate with a special antenna designed specifically to suppress radiation in the direction of the Green Bank facility. *See Report and Order in Docket No. 16882, supra* ; Tr. 118-119. Had Achernar made comparable engineering modifications designed to protect Green Bank from interference, it would serve no non-common gray area at all. Lindsay Exh. 3 p.5; *I. D.*, paras. 27, 73. Furthermore, in assigning a new FM station to Amherst, Virginia in 1978, *First Report and Order in Docket No. 20954, supra*, the Commission specifically recognized that coverage advantages may be outweighed by the need to protect the zone when it premised the assignment on a transmitter site location outside the zone even though a site within the zone would have afforded greater white and gray area service. Thus, we agree with the ALJ that it would be inappropriate and inequitable to reward Achernar's superior coverage with a preference (at the expense of a competing applicant who located outside the zone), which derives solely from its choice to disregard traditional Quiet Zone protections. [3] We will not encourage further invasions of the Quiet Zone by creating the incentive of credit for gray areas, areas which remain gray because of the existence of the specially created zone in the first instance.

14. We also agree with the ALJ that Lindsay suffers no diversification demerit because his company, K-W, produces and distributes a weekly religious feature for newspapers and assists some of the newspapers in selling sponsorships for the feature. Achernar, which does not dispute the ALJ's conclusion that Lindsay should receive no demerit for its publication of two out-of-state weekly newspapers, has not shown how this seemingly lesser media interest has any greater diversification consequences. The feature is prepared well in advance of the publication date, has no news content with respect to any community, let alone Charlottesville, consists of a non-denominational, inspirational message, and is subject to the ultimate editorial control of the newspapers that accept it, rather than Lindsay or K-W. The Commission has considered, but traditionally given little or no weight to, non-daily circulation newspapers or magazines as a diversification factor because there is no meaningful adverse impact on the Commission's diversification policies. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 787-788 (Rev. Bd. 1986), and cases cited therein, *recon. denied*, FCC 80R-58, released September 18, 1986. There is no reason to depart from this precedent to give any appreciable weight here to merely an insert published on a weekly basis, which Achernar itself describes as a "novel" media interest (Br. at 35), and over which, unlike his weekly newspapers, Lindsay has no final editorial control. [4]

15. We will also fully credit Lindsay's integration proposal. Lindsay has complied with the Commission's expectation that applicants with outside employment or other interests demonstrate how they will accommodate those activities so as to meet their full-time commitment to the station. *See Cuban-American Ltd.*, 5 FCC Rcd 3781, 3785 (1990). As to his business, K-W, Lindsay expressly testified that while he now spends ten to twenty hours a week there, he would delegate day to day activities to his managers and thus reduce his commitment to "no more than ten hours a week," and, as to his two North Carolina weekly publications, that he would continue his present practice of spending two to four hours a week on their oversight, but even that time could be eliminated if necessary because the newspapers are currently managed on a daily basis by his son. Lindsay Exh. 2, pp.6-7; Tr. 465-466, 470-471, 528, 535-536, 555-556, 560; *I. D.*, paras. 18, 90. Thus, Lindsay's total work week at most will be in the fifty to sixty hour range, which does not approach the seventy to eighty hour work commitments which the Commission has refused to credit. *See Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125 (Rev. Bd. 1985), *rev. granted on other grounds*, 104 FCC 2d 438 (1986) (80 hour proposal not credited); *Northern Sun Corp.*, 100 FCC 2d 889, 892 (Rev. Bd. 1985), *rev. denied*, FCC 86-135, released March 28, 1986 (70 hours "teeters on the outer limits of credibility"); *Bradley, Hand & Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982) (50-60 hour proposal credited); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12 (Rev. Bd. 1978) (70 hour proposal discredited). In short, Achernar has not shown that Lindsay intends to work full-time at

anything other than the proposed station or that Lindsay's credit should be reduced from full-time to "substantial" time.

CONCLUSION

16. Both applicants are entitled to 100% quantitative integration credit and the case must therefore be decided on the basis of qualitative differences. In this regard, Lindsay, who was born in 1930, has resided most of his life in Charlottesville, whereas Achernar's principal, Ms. Polivy, has maintained a part-time residence in the proposed service area since 1972 and proposes full-time future residence in the service area. Lindsay is substantially preferred under this factor because the Commission favors residence of some years' duration over proposed future residence, as well as residence in the principal community over the service area. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Plainly, Lindsay's life-long Charlottesville residence must be deemed superior to Achernar's part-time residence in terms of the Commission's objective that local residence indicates a likelihood of continuing knowledge of changing local needs and interests. *Id.* Lindsay is also preferred because he has a history of participation in civic organizations and community activities in Charlottesville whereas Achernar has none. Achernar, on the other hand, is entitled to female enhancement credit. On balance, Lindsay's advantages in two key areas, including the "fundamental public interest consideration" of local residence, *see Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985), and civic participation, which is "considered as a part of a participating owner's local residence background," *Policy Statement, supra*, 1 FCC 2d at 396, outweigh Achernar's single advantage for female participation. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 495-496 (Rev. Bd. 1984), *rev. denied*, 58 RR 2d 439 (1985) (subsequent history omitted) (long-term local residence, civic participation, and broadcast experience outweighed participating female ownership and proposed future local residence). There being no other comparative differences or preferences, a grant to Lindsay will best serve the public interest, convenience, and necessity. [5]

17. ACCORDINGLY, IT IS ORDERED, That the application of Lindsay Television, Inc. (File No. BPCT-860410KQ) for a new television station in Charlottesville, Virginia IS GRANTED, and the application of Achernar Broadcasting Company (File No. BPCT-860410KP) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The issue was designated because 47 CFR § 73.1030(a) requires an applicant proposing to operate a broadcast station at a site within an area bounded by certain coordinates to notify NRAO in Green Bank, West Virginia, to determine if harmful interference could result from the proposed station to the NRAO facilities. NRAO, having objected to Achernar's proposal pursuant to § 73.1030(a), was made a party under this issue.

[2] NRAO, which had fully supported the original initial decision, *see* Tr. 1214-1219; 1587-1588 (because as a matter of policy it did not oppose grants outside of the Quiet Zone), has now changed its position. Having failed to file exceptions to Lindsay's prior grant, it is questionable whether NRAO can legally challenge what it had strongly supported. *See* 47 CFR § 1.277(a).

[3] The Commission's general statement in *KIST Corp., supra*, cited by Achernar, that an applicant may structure its proposal in the most advantageous way, was made in the context of evaluating an integration proposal's *bona fides* and has no bearing on the facts before us.

In a different but somewhat analogous context, the Board has stated: "Almost any applicant could serve more people if it ignored our technical . . . requirements; that is no feat." *Clay Television, Inc.*, 95 FCC 2d 1167, 1172 (Rev. Bd. 1983) (subsequent history omitted). Similarly, any prior applicant could have claimed the public interest benefit of gray area coverage by invading the Quiet Zone, but the Commission's policy here plainly elevates the zone over gray area coverage. Achernar would have us invert those priorities by awarding a coverage preference to an applicant who sited within the zone. Though we do not go so far as to disqualify Achernar, we will not disregard the policy behind the zone by doubly rewarding its incursion. If the Commission desires, above all, new broadcast service within the zone, all it need do is modify or abrogate § 73.1030(a). We will not do so obliquely.

[4] In *Daytona Broadcasting Co., Inc.*, cited by Achernar, consideration, but no significant weight, was given to a non-daily magazine over which the applicant had editorial control. With regard to Lindsay's role in finding sponsors for the insert, Achernar's reliance on *Mid-Florida Television* Corp., 69 FCC 2d 607, 649 (Rev. Bd. 1978) is misplaced, since, unlike that case, there is no evidence here of a potential conflict of interest arising from the common ownership of an advertising agency and a broacast station in the same market.

[5] We need not examine further the Bureau's exceptions to the ALJ's refusal to order a share-time arrangement between NRAO and the winning applicant. Insofar as Achernar is amenable to such an arrangement, the matter is moot because Achernar is not the prevailing comparative applicant. As for Lindsay, it has steadfastly refused to consider any time-sharing agreement with NRAO, as NRAO has with it, and we seriously doubt that we could condition a grant to Lindsay in this manner since there is no precedent for attaching conditions on protecting the Quiet Zone to an applicant transmitting from outside the zone. We believe any such restriction on Lindsay's grant, therefore, must be imposed by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
RADIO MABLETON LIMITED	File No. BPH-870710MT
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New FM Station on Channel 273A (102.5 MHZ), Mableton, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1990; Released: October 30, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. This proceeding involves the competing applications of Mableton Broadcasting Company, Inc. (MBC), Gonzales Broadcasting, Inc. (Gonzales), Bolton Broadcasting, Limited (BBL), Voth Broadcasting Company (Voth), Radio Mableton Limited (RML), Metropolitan Management Corporation (MMC), Lorenzo Jelks (Jelks), QRW Partners Limited Partnership (QRW), and Mableton Communications, Limited (MCL) for a Construction Permit to establish a new FM broadcast station on Channel 273A at Mableton, Georgia. The applicants have filed before the Review Board exceptions (and replies) to the *Initial Decision*, 5 FCC Rcd 2474 (1990) (*I. D.*), of presiding Administrative Law Judge Walter C. Miller (ALJ). Oral argument was heard on September 7, 1990.

2. The *I.D.* awarded the Construction Permit at contest to BBL. After finding several of the applicants to be basically unqualified, the *I.D.* concluded that BBL alone of the six qualified applicants was entitled to the important credit that attaches to integration of active ownership with station management. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Because we agree with virtually all of the exceptors that BBL is entitled to no such "integration" credit, and since we determine that RML and MCL may be entitled to serious comparative consideration after further evidentiary testing of their applications, we must remand this proceeding for supplemental hearing on the issues discussed hereinbelow. Moreover, and for the additional reasons discussed *infra*, we must modify the *I.D.* as to MMC and QRW. Although the *I.D.* dealt with certain perceived flaws in those two applicants by denying them "integration" credit, it is evident that the ALJ rejected their proposals in indeterminate part because he found problems with their financing, *see id*, paras. 137-140; 147-149 (respectively), yet no financial issue was added or tried against either. All four of these latter applicants likewise propose 100% minority (and/or female) "integration," and might be close contenders as a result of our rejection of BBL as the superior applicant; a more focused testing of their applications therefore waxes imperative. We now discuss each of the five specifically implicated applicants.[1]

BOLTON BROADCASTING LIMITED

3. Like a number of other applicants in this particular proceeding (and of late generally), BBL projected itself as a two-tiered, "active"/"passive" construct, in its case a limited partnership consisting of (1) a sole "general" partner, Janet Bolton (20% BBL equity share); and (2) a corporate "limited" partner, Mableton FM Investors, Inc. (80% BBL equity share), with five equal shareholders: J. William McArthur, Jr., his brother Dr. T. Reid McArthur, Dr. C. Gary Bullard, James McCarter, and Rhys T. Wilson. *I.D.*, paras. 117-118. Because the personal attributes of only "active" principals are reckoned for credit under the 1965 *Policy Statement*, *see, e. g., Victory Media*, 3 FCC Rcd 2073 (1988); *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), BBL sought and was awarded a 100% (extrapolated) credit for basic ownership "integration,"

grounded purely upon Janet Bolton's gesture to abandon her 20-year career as a teacher and devote full-time as general manager of the proposed station. *I.D.*, para. 28. Concomitantly, BBL was awarded a 100% (extrapolated) factor for Bolton's local residence, her civic activities, all enhanced by another 100% (extrapolated) edge because Bolton is a black female. *See id.*, paras. 229-232. As the only applicant of the remaining nine awarded any "integration" credit by the ALJ, BBL easily prevailed below. *See id., Concls.*, paras. 31-39.

4. Although the *I.D.*rejected the "integration" claims of several other applicants (*see I.D.*, paras. 68-92 as to MBC; id., paras. 95-115 as to Gonzales; id., paras. 131-142 as MMC; id., paras. 144-160 as to QRW), he credited the BBL limited partnership after opining that Janet Bolton was a genuine "general" partner and in solitary control of BBL (*see id.*, paras. 117-124; *Concls.*, paras. 35-36). Invoking the facts of record and a legion of recent sham ownership cases, the exceptors argue that Janet Bolton is no more than a last-minute front for the five "limited" partners, particularly William McArthur, the progenitor of the BBL application and the only BBL principal with broadcast experience. We agree with the exceptors that the evidence does not support the award of "integration" credit to BBL.[2]

5. The record reflects, and BBL does not deny, that Janet Bolton was offered her 20% equity interest and putative controlling status a mere 72 hours before the application filing deadline, after several other prospects for the honor had declined. Janet Bolton has been a public school teacher for more than two decades, has no broadcast experience, and has no obligation to pay for her 20% equity share of BBL, a $400,000 venture at its inception. As to how she was selected to "control" BBL and exclusively manage its proposed station, BBL asserts that "Bolton was recommended by [limited partner] Dr. Gary Bullard who had known her professionally for years."[3] It turns out, however, that Bullard is a veterinarian who secured Bolton's name from his receptionist; Bullard had examined Bolton's dogs (on 4-6 occasions), Tr. 1940, but the two had no prior social acquaintance or business relationships when Bullard passed her name along to William McArthur's brother Reid, another BBL "limited" partner.

6. Based on that casual referral, William McArthur phoned Bolton and offered her BBL's "general" partnership and a 20% equity share. Though Bolton and McArthur met the next evening, McArthur never inquired into Bolton's business or investment experience (she had none, Tr. 2074); no check was made[4]; and Bolton was not aware at the time she signed the partnership agreement of her personal liability for BBL as its unitary "general" partner (Tr. 2005-2006). Apart from William McArthur's brief meeting with Bolton (and Bullard's professional relationship with Bolton's domestic animals), she had not met or spoken to any of the five "limited" partners, nor they her, when Bolton became their leading partner in the Georgia broadcast business.

7. When questioned at hearing as to why he chose the unknown Bolton as "general" partner, William McArthur (a Coca Cola tax attorney who currently works part-time for an Altanta-area station and has worked continuously in broadcasting through high school, college and law school) responded as follows (Tr. 2537):

> [ALJ]: Did you recruit Janet Bolton because she was a black female?
>
> [McArthur]: No I did not.

For his part, Bullard suggested that, based on the manner of her care of her dogs, he felt Bolton to be of good character (Tr. 2918); but for her part, Bolton had no idea how or why she was selected ("I don't know what their reasons were. I was never told." (Tr. 2072)).

8. Whereas Bolton believes that the "limited" partners will finance construction and operation of the station, she also testified here as follows (Tr. 2058-2059):

> Q. But you've never had any discussions with the partners, the limited partners, as to how and when they will make the money available, have you?
>
> A. No.
>
> Q. And there's been no agreements that you know of as to how they're going to make the money available, have there?
>
> A. No.

Moreover, while Bolton felt that the "limited" partners were expected to fund BBL, she did not know even if the partnership agreement obligated them to do so (Tr. 2060). "[O]ther than my saying so," Bolton could express no basis for her belief that the "limited" partners were required to fund BBL (*id.*). Though Bolton personally certified as to BBL's financial ability to construct the station, she conceded (Tr. 2067-2068):

> Q. Let me try to get at it this way. You don't have any experience in building anything, do you?
>
> A. No.
>
> Q. And you have never negotiated with contractors. Is that correct?
>
> A. That's correct.
>
> Q. You've never negotiated with equipment suppliers.
>
> A. That's correct.
>
> Q. You've never negotiated with electricians.
>
> A. That's correct.
>
> Q. So you really don't know the first thing about constructing a common shed in the backyard, much less a radio station, do you?
>
> A. No, sir, I do not.
>
> * * *
>
> Q. You didn't anticipate that any of these men that were putting up the money were going to help you in constructing this radio station?
>
> A. No.

9. Much as with the discredited "limited" partnership in *Carta Corp.*, 5 FCC Rcd 3696, 3696-3702 (Rev. Bd. 1990), Bolton (who proposes to utterly abandon 20 years of teaching) had no real idea of her salary as general manager or where it would come from, as witness (Tr. 2057-2058):

> Q. Ms. Bolton, in line with the question the Judge asked you, I think you testified that you had agreed upon a salary for acting as general manager at Bolton's proposed station? Is that correct?
>
> A. We have discussed a salary, yes.
>
> Q. But there's been no agreement on it?
>
> A. No.
>
> Q. Do you anticipate that there will be a time between the date you leave your job with the schools and time the station has been operating for three months where the money for your salary is going to have to come from the limited partners?
>
> A. There might be a time, yes.
>
> Q. Rather than from revenues from the station. I guess a better question would be where would the money come to operate the station til revenues come in sufficient to cover operating expenses. That will come from the limited partners. Is that correct?
>
> A. That's correct.
>
> Q. And the system to be used to obtain those monies will be the same as you've been using now. You'll call up Mr. McCarter and say I need X number of dollars to make payroll, say.
>
> A. I don't know how it's going to be.
>
> Q. Okay. So there's been no determination of how that's going to work. Is that right?
>
> A. No, there has not.

Whereas Bolton felt her salary would be greater as station general manager than as a teacher (Tr. 2490), a salary she claims she negotiated with McArthur at their brief meeting (Tr. 2490-2491), she was uncertain whether any figure was ever reduced to writing (Tr. 2510); and McArthur himself recalled no discussion of a particular salary (Tr. 2786). Bolton did not know the difference between a general manager and a station manager ("To the best of my knowledge, I am really not sure." (Tr. 2490)); she intended nonetheless to hire a station manager (Tr. 2476).

10. William McArthur selected BBL's communications counsel (Tr. 2534 2539, 2715, 2751), subject to Bolton's token affirmation. While Bolton does not recall reviewing the partnership agreement when signing the application (Tr. 1986), she was under the impression that BBL counsel had negotiated the agreement in *her* behalf (she had no negotiations (Tr. 1959-1961)); and she did not know then or at hearing who had prepared the partnership agreement (Tr. 2002-2003). She believes that the limited partners are responsible for the legal bills (and other application expenses), but paragraph 10 of the BBL partnership agreement confines the captial contribution of the limited partners to $7,500, BBL Exh. 8; and Bolton has had no specific discussions with the limited partners as to how the necessary $400,000 will be made available for construction and initial operation of the station (*see supra* para. 8). Although Bolton's direct testimony stated that she had been "personally in charge" of preparing the BBL application, (1) she has never met or spoken to the engineer and did not even recall the name of BBL's engineering firm (Tr. 1979); and (2) regarding her financial certification, she made no inquiry as to the projected construction and operating costs, but took counsel's "word" on figures she believed were "received from reports" provided to counsel and/or the engineer (Tr. 2000-2001). While Bolton believed that BBL would lease its equipment, she never contacted a leasing company, never saw or received a "reasonable assurance" letter from one (*see Pepper Schultz*, 5 FCC Rcd 3273 (1990)), and does not know if leased equipment would be available to BBL (Tr. 2033-2035). Finally, as one exceptor here observed[5]:

> Since agreeing to participate in the partnership, Bolton had made no subsequent effort to acquaint herself with the broadcasting business. Tr. 2464.
>
> She has visited no FM stations, she subscribes to" no broadcast journals or publications; she has" attended no broadcast seminars; she has taken no" courses in broadcast management or even looked into" the availability of such courses. Tr. 2463-64.

Notwithstanding the foregoing,[6] BBL contends that Bolton has heretofore controlled BBL, and will have solitary dominion over the station (and the partnership's multihundred-thousand dollar investment).

11. In *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989) (footnote omitted) (*aff'd as modified*, FCC 90-294, released September 19, 1990), we reported:

> As is by now widespread knowledge, the Commission's relaxation of its ownership attribution rules, when conjoined with its various comparative preferences and the statutory amendment removing all monetary limits from applicant settlements in comparative licensing cases, has spawned a plague of "sham" applications which project a bogus two-tier ownership structure in order to skew the comparative mathematics. The recent rash of "sham" applications has been nearly without number, but illustrative variations of the ploy may be found in *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288 (1985), *affirmed by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *N.E.O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986); *Pacific Television Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 4541 (1988); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd.), *recon. denied*, 1 FCC Rcd 1267 (Rev. Bd. 1986), *review granted in part and denied in part*, 2 FCC Rcd 6080 (1987), *aff' d by judgment sub nom. Spectron Broadcasting Corp. v. FCC*, 858 F.2d 744 (D.C. Cir. 1988); *Magdalene*

Gunden Partnership, 2 FCC Rcd 5513 (Rev. Bd. 1987), *recon. denied*, 3 FCC Rcd 488 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 7186 (1988).

This perverse phenomenon has not gone unremarked in the press, *see, e.g.*, Barnes, *Investors Use Blacks As Fronts to Obtain Broadcasting Licenses, Wall St. J.*, December 11, 1987 at 1, col. 1; Tillotson, FCC's Comparative Process As A Sham And A Shamble, BROADCASTING, October 5, 1987, at 22, or at the Commission, *see Revision of Application for Construction Permit*, 4 FCC Rcd 3853, 3856 (1989). One of the most pedestrian devices is the "limited" partnership," wherein a token principal having the favored personal attributes is purportedly ceded the exclusive "general" partnership powers, while given merely some fractional share of the aggregate equity.

See also Carta Corp., supra; Poughkeepsie Broadcasting Limited, 67 RR 2d 1580, 1584-1585 (Rev. Bd. 1990). And as the agency itself recently acknowledged to the court[7]:

The Commission is mindful, nonetheless, that an applicant may present a favorable formal structure on paper in order to gain a preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in (if not control) the applicant's decision-making process. In those instances, the Commission will disregard the applicant's formal ownership structure and treat the nominal passive owners (i.e., non-voting stockholders or limited partners) as if they were active in the management of the applicant and consider them in any integration analysis. *See, e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1493-1497 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988) (table); KIST Corp., 102 FCC 2d 288 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986) (table), *cert denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co., Inc.* 63 FCC 2d 419 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be disregarded.

No less than the Supreme Court has recognized the easy potential for abuse, but observed:

The FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham integration credits claimed by all applicants, including minorities. *See , e.g.. Silver Springs Communications*, 5 FCC Rcd 469, 479 (1990); *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8149-8150, 8159-8160 (1989); *Northampton Media Associates*, 3 FCC Rcd 5164, 5170-5171 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3955 (Rev. Bd. 1988); *Mulkey*, 3 FCC Rcd 590, 590-593 (Rev. Bd. 1988), *modified*, 4 FCC Rcd 5520, 5520-5521 (1989); *Newton Television Limited*, 3 FCC Rcd 553, 558-559, n. 2 (Rev. Bd. 1988); *Magdalene Gunden Partnership*, 3 FCC Rcd 488, 488-489 (Rev. Bd. 1988); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6129-6130 (Rev, Bd. 1987); *Pacific Television, Ltd.*, 2 FCC Rcd 1101, 1102-1104 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988); *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1054-1057 (Rev. Bd. 1986); *N.E.O. Broadcasting Co.*, 103 FCC 2d 1031 1033 (Rev. Bd. 1986); *Hispanic Owners, Inc.*, 99 FCC 2d 1180, 1190-1191 (Rev. Bd. 1985); *KIST Corp.*, 99 FCC 2d 173, 186-190 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288, 292-293, and n.11 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 255 U.S. App. D.C. 379, 801 F.2d 1436 (1986).

Metro Broadcasting Inc. v. FCC, 110 S. Ct.2997, 3025 n.48 (1990).

12. Relying heavily on *Victory Media*, BBL contends that the genuineness of its ownership structure is undermined by neither the deadline recruitment of Bolton, nor her complete lack of broadcast or management experience, nor her negligible financial contribution, nor by the fact that the "limited" partners organized and controlled BBL up until 72 hours before the filing deadline. Rather, BBL states: "In determining the *bona fides* of a limited partnership arrangement, the record as a whole must be evaluated."[8] We agree that the Commission has held that no single aspect of the foregoing indicia is determinative, or even the cummulative presence of several of these indicia. [9] BBL is quite correct that "it is appropriate to examine the totality of facts in determining whether an applicant's ownership proposal is *bona fide*. *Metroplex, supra*, FCC 90-294 (at n.8); *accord, Coast TV*, 5 FCC Rcd 2751, 2753 n.4 (1990); *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6130 (Rev. Bd. 1987)("It is the totality of the record evidence that must be considered in determining whether the proposed structure is creditable for integration purposes."), *review denied*, 3 FCC Rcd 4541 (1988). *See also* 5 U.S.C. § 556(d) ("APA") (adjudicatory decisions must evince "consideration of the whole record").

13. Commencing with the venerable principle that every applicant bears the burden of proof on all facets of its comparative case, *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2435-2436 (Rev. Bd. 1990) (and cases cited therein); *see generally also Cuban American Limited*, 5 FCC Rcd 3781, 3785 (1990), BBL, to frame it philanthropically, has not supported its claim for perfect "integration" credit. As in *Metroplex, Carta Corp.*, and *Poughkeepsie Broadcasting*, Bolton was alast-minute plug-in to a prestructured application; she offers no appreciable *quid pro quo* for her equity share (for which there was no arms-length negotiation); and she was a complete stranger when the entrepreneurs allegedly secured her "stewardship." As in *Carta Corp.*, she did not investigate the projected costs of the venture (but took counsel's "word"); she had never met or spoken to the engineer; counsel was conveniently provided by the "passive" investors; she was unclear about her personal liability as *the* "general" partner when she signed the BBL agreement; and she knew not what her salary would be (or where it would come from) in the crucial start-up phase. Nor did

she know what, *if anything*, obligated the "limited" partners to assure funding for the entire venture. To paraphrase the Commission's recent *Metroplex*[10]:

> It is not credible that a group of . . . investors . . . would grant exclusive control of their station to a virtual stranger with no broadcast experience, who would make no investment in the station. On the facts before us, we fail to see any legitimate *quid pro quo* by [Bolton] for becoming general partner. We have in the past rejected such instances of "giving away the store" as unworthy of credence. *See KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8 (1985).

To the degree that the *Metroplex* Commission determined that "giving away" a 4% equity share (and alleged exclusive control) under nearly identical circumstances was "unworthy of credence," the presentation of a 20% equity share to Bolton (and alleged exclusive control) appears, *a fortiori*, more far-fetched.[11] BBL is no *bona fide* limited partnership. We yield eagerly to the torrent of exceptions against BBL's 100% "integration" credit, and strip it to a quotient of naught.[12]

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14. RML, on the other hand, was denied any and all "integration" credit ecause of the failure of its initially exchanged hearing exhibits to repeat the pledges of its two "general" partners, Charlotte Timms and Ken Childs (25% equity each), made in its "Integration Statement of Radio Mableton Limited." RML's "Integration Statement" was filed, pursuant to the ALJ's written directive, just two months prior to the exhibit exchange date. While the ALJ, immediately recognizing the situation as a harmless technical inadvertence, afforded RML the opportunity to proffer a reformed hearing exhibit that tracked its prefiled "Integration Statement," *see I.D.*, paras. 128-130; *see also* Tr. 179 *et seq.*, he later changed his mind and ruled that allowing RML an opportunity for reformation would "cost him control of the case." *Memorandum Opinion and Order*, FCC 89M-516, released February 14, 1989 (at 3). Accordingly, RML was deemed to have proposed no "integration."

15. The genesis of this misunderstanding is as follows: With a prior Review Board having held that the applications themselves are not automatically in evidence and that, in any event, the specific questions on a (superceded) application form (FCC Form 301) relating to proposed ownership participation were not the formal "integration" pledges, *Gainesville Media Inc.*, 72 FCC 2d 803, 817 (Rev. Bd. 1978) (concurring opinion of Board Member Ohlbaum), it became the practice of certain of the ALJs to defer the filing of "integration" proposals until the initial exhibit exchange date, a point quite late in the process (and which practice eventually led to much comparative gamemanship[13]). Or, as we observed in *Northland Communications*, 100 FCC 2d 914, 917 (Rev. Bd. 1985) (emphasis added),[14] there analyzing prior case law as to the deadline for the filing of "integration" statements:

> These three cases may fairly be read to stand for the proposition that applicants are not entitled to participation credit for proposals that are uncertain and indefinite on the date the proposals are required to be set forth. As indicated . . . this has generally come to mean the exhibits exchange date. Although *High Sierra* contains language suggesting that the proper focus of inquiry concerning contingent proposals should be on the principal's intention as of the "B" cut-off date, this guideline was more pertinent to applications filed under the old version of FCC Form 301 where at least in theory participation proposals could often be determined from a review of the application. This rationale has less force, however, under the revised form which deletes all items under which an applicant's proposal could ostensibly be set forth. *See Revision of Form 301*, 50 RR 2d 381 (1981). Thus, unless the Commission otherwise requires applicants to specify the particulars of their ownership proposed participation at an earlier point, we will not consider a proposal as violative of the general prohibition against post "B" cut-off upgrading where it is definite and final on the exhibit exchange date - *or earlier if specifically called for by the ALJ. In this latter regard, we have specifically approved the procedure employed in Metro Broadcasting, Inc. ... of requiring applicants to submit their complete proposals prior to the commencement of hearing, observing that such a procedure not only expedites matters but also encourages earlier settlements and lessens litigation.*

16. Accepting the Board's *Northland* invitation, this ALJ's *Prehearing Order*, FCC 88M-3042, released September 16, 1988, specifically required all applicants to formally file their "integration proposals" by September 28, 1988, and "identify the principals who are to be integrated at the proposed stations day-to-day operation, the positions to be held, the duties to be performed, the amount of hours to be devoted to those duties, and whether any female or minority enhancement will be claimed." In a footnote (n.3) to that explicit directive, the ALJ admonished (emphasis added):

> If a principal intends to abandon present employment to become integrated he or she should specifically indicate that that is the case. If the applicant doesn't intend to claim any quantitative integration, they should file a statement to that effect on the above due dates. *The failure to exchange a timely integration statement could result in the loss of an integration credit. See Northland Communications, et al.*, 100 FCC 2d 914 (Rev. Bd. 1987) *aff'd* 60 RR 2d 776 (1986).

17. On September 28, RML duly filed its formal "Integration Statement," setting forth in complete detail all of the particulars called for in the *Prehearing Order* as to Timms and Childs (*e.g.*, proposed duties and hours, employment, broadcast experience, residence, minority and female claims, etc.). However, on the December 13, 1988 exchange of direct cases, RML did not replicate the proposals of its "Integration Statement," but -- claiming misunderstanding -- sought to reform its exhibits to incorporate those pre-filed proposals. No substantive changes between its "Integration Statement" and the proferred exhibits were evident. However, its Exhibits 1 and 2 were rejected (but for reasons unimportant here its Exhibit 3 [Childs' biography] was admitted.)[15]

18. Under the unusual circumstances presented here, we believe that the ALJ's reflexive instinct to permit RML to reform its exhibits to conform to its "Integration Statement" was correct. Although, as a technical matter, RML's prefiled "integration" proposal did not again accompany its direct case exchange, its "Integration Statement" was already officially on record, RML intended to propose no variance or "contingencies," no delay or prejudice appeared likely, and the question was hypertechnical. We fully appreciate the ALJ's tergiversations, and fault him neither for first inviting RML to reform nor for subsequently changing his mind, for his conduct throughout suggests a conscientious effort to do justice and avoid prejudice. Albeit, we find that RML's failure to duplicate its prefiled "Integration Statement" again in its exhibits to have been a harmless technical error; and so long as no variance or upgrading was contemplated, no prejudice would have inured to the competing applicants by allowing reformation. As did the ALJ, we fully appreciate how this minor misunderstanding arose, but will permit RML to reform and to have its actual "integration" proposal tested in a hearing crucible (its comparative case was neither tried nor considered, *I.D.*, para. 173), just as RML tested and challenged the comparative proposals of its adversaries.

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19. MCL is a limited partnership consisting of (1) "general" partner Ralph Crossley (95% equity), a black male, who is a long-time (since 1979) resident of the proposed service area (with correlative civic activities), as well as (since 1978) broadcast experience, and who also proposes full-time "integration" as general manager of the MCL station[16]; and (2) Skywave Communications Corp. (5% MCL equity), which had originally planned to file its own competing application for this facility, but merged instead with Crossley and traded its engineering and transmitter site in exchange for its 5% equity interest in MCL. *I.D.*, para. 51. However, at the prehearing stage, the ALJ added, and found adversely against MCL, two basic qualifying issues, to wit:

> To determine whether MCL has reasonable assurance that their proposed transmitter/tower site is available, and if not, whether MCL is qualified to be a Commission licensee;
>
> To determine whether MCL has misrepresented the facts or lacked candor with the Commission about the availability of their proposed transmitter/tower site.

Additionally, although "[n]either MCL nor Skywave have any attributable media interests," the ALJ charged MCL with a "diversification" demerit because "Ralph Crossley is the General Sales Manager at WAOK/WVEE in Atlanta, Georgia," which the ALJ believed represented a "media interest" for "diversification analysis purposes." *I.D.*, para. 183. However, the ALJ further declared: *"Assuming* that MCL were basically qualified they face no ownership structural difficulties." *Id.*, at para. 166. Though MCL excepts to the ALJ's findings and conclusions under the two transmitter site-related issues, as well as to his assessment of a "diversification" demerit, none of MCL's opponents excepts to the ALJ's contingent comparative assessment of MCL. Any such potential exceptions are therefore waived. 47 CFR § 1.277(a); *see also Pueblo Radio Broadcasting Service*, 5 FCC Rcd 4829, 4832 (Rev. Bd. 1990); *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1172 (Rev. Bd. 1990). But, in its exceptions (at 43-44), Gonzales does react to the ALJ's refusal to add a financial (and parallel misrepresentation) issue against MCL, claiming that Crossley had no grounds for certifying the MCL application in the affirmative, based upon a loan letter from Bank One, Indianapolis, Indiana.

20. *Transmitter Site*. The facts surrounding MCL's transmitter site problems are undisputed. Prior to filing its application, MCL's engineer, Richard Biby, contacted Skyway (for whom he had worked on previous applications), knowing that Skywave had also planned to file for this Mableton FM frequency (Tr. 5707). As a result of Biby's consultation, Skywave opted not to file individually, but to instead trade its transmitter site and engineering to Crossley for its 5% share of MCL (Tr. 5713). Skywave's own "reasonable assurance" of its transmitter site had been secured in April 1986 by the son (Tim) of Skywave's president, Lee Perkinson, from a family named Marler.

21. Next, the facts surrounding the acquisition of the Marler property are as follows: Tim Perkinson personally visited the Marlers, was advised by Ralph Marler that the property desired was owned jointly by his wife (Lois) and his brother (James), but that he (Ralph) could make the deal for them as their agent (Tr. 5552, 5605). Lois Marler affirmed the authority of her husband to negotiate for the property rights (*see* Tr. 5549, 5558, 5574), just as she relied upon her husband generally on matters of business (MCL Exh. 29). Shortly thereafter, Perkinson received a letter from Ralph Marler attesting to his "authority to enter into agreements concerning sale lease, or use of the property," indicating that the Marlers are "willing to lease your company this property for your broadcast station," and acknowledging that "I understand that this letter may be submitted to the Federal Communications Commission as evidence that you have reasonable assurance that your site will be available." [17] In May, 1987, Lee Perkinson reconfirmed by phone the continued availability of the Marler property (MCL Exh. 7; Tr. 5633); but shortly thereafter, Perkinson elected to meld into Crossley's MCL. Consequent to that merger, Crossley specified the Marler property as the transmitter site for MCL.

22. On October 17, 1988, RML sought a transmitter site issue against MCL based upon (1) the declaration of one Matt Cook, a business acquaintance of RML principal Charlotte Timms, averring that he had visited the Marlers who "had never heard of Ralph Crossley, Jr." or MCL; and (2) the declaration of Lois Marler, averring that the property was owned by her and her brother-in-law (James), neither of whom had given MCL personal permission to specify the property.[18] MCL's opposition to the RML petition avowed (1) that inasmuch as Ralph Marler had discussed the site with Perkinson, it was not surprising that the Marlers did not recognize the name Crossley (or MCL), nor were they aware of Perkinson's juncture with MCL; and (2) that "Mr. Marler has advised counsel for MCL that he now recalls his earlier letter [*supra* note 17], and that the property may in fact be available to MCL." MCL also represented that Marler wished to discuss the matter more fully with his brother James (who was expected to be out of town for a week) before making a final decision. MCL simultaneously advised the ALJ[19]:

> MCL will promptly inform the Presiding Officer of Mr. Marler's response. If the Marlers decide that they do not now choose to make their property available, MCL will notify the Commission in accordance with § 1.65 of the rules and will select another site.

Nonetheless, and based upon the pleadings, the ALJ added the dual site-related issues agaginst MCL. *I.D.*, paras. 53-54.

23. After MCL's continuing negotiations with the Marlers failed to produce a revised agreement, MCL sought and received assurance of the site specified by another instant applicant, QRW; and it filed on January 19, 1989 a petition for leave to amend to their new site. "By specifying another applicant's site, there would be no change required for the Joint [Engineering] Exhibit and since the power and other operational parameters were the same as QRW's, there would be no requirement for additional processing."[20] However, on February 9, 1989, the ALJ rejected the MCL amendment, *see* FCC 89M-453, primarily based on his view that (*id.*, at para. 3):

> MCL has failed to show that its amendment isn't required by its own voluntary act. In fact, again the opposite is true. Ralph Crossley, MCL's 95% owner, took no steps himself to assure that his proposed site was available. Instead, he relied on the misguided efforts of his 5% limited partner [Perkinson]. It was only after a site availability issue and site misrepresentation issue were added against MCL that they voluntarily began looking for another site.

24. Having found that Crossley had no reasonable basis for specifying Perkinson's Marler property on the MCL application, *see I.D.*, paras. 51-67, it followed -- in the ALJ's view -- that MCL was guilty of making a "false financial certification," *id.*, at para. 67, because "on July 10, 1987, when Ralph Crossley certified that MCL had a transmitter site was [sic] available, he was about as mentally ill-equipped to do so as a person can be." *Id.*, at para. 65.

25. A disposition of MCL's exceptions to its disqualification, under the facts presented here, requires a two-pronged inquiry: *first*, whether Skywave could claim "reasonable assurance" of the Marler property, and MCL then specify the Skyway site; and, *second*, whether, in turn, MCL met the stringent test for a site amendment when the Marler property could not be relied upon. Both elements of the first question are clearly answered in the affirmative. The Commission has never required more than " *reasonable* " assurance of a transmitter site, *see, e.g., Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990); and Ralph Marler's letter (*supra* note 17) to Perkinson plainly met the Commission's standard. In fact, the Board has recently found "reasonable assurance" in two cases where, very much as here, property owners have provided what was patently such "reasonable assurance," but later equivocated or sought to renege on their offer. *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1960-1963 (Rev. Bd. 1990); *George Henry Clay*, 5 FCC Rcd 317, 318-319 (Rev. Bd. 1990). Perkinson continued to be a principal of MCL, and Crossley had no basis to suspect that the Marler property was not available to Perkinson in his new MCL capacity. An "applicant need only obtain assurance sufficient . . . to justify . . . belief that the . . . site [is] suitable and available until advised otherwise." *Elijah Broadcasting* (at para. 10) (internal quotes and citation omitted). *Compare, e.g., Adlai E. Stevenson IV*, 5 FCC Rcd 1588 (Rev. Bd. 1990); *Dutchess Communications*, 101 FCC 2d 243, 252-254 (Rev. Bd. 1985) (applicant merely assumes to a site without assent of landowner); *South Florida*, 99 FCC 2d 840 (Rev. Bd. 1984) (same).

26. The next, and more difficult, inquiry here is whether MCL should have been permitted to amend in January 1989, when it appeared from Lois Marler's declaration of October 1988 (*supra* note 18) that the Marlers might renege on their 1986-1987 assent to Perkinson. This is a closer question; but on the facts and relevant precedent, we believe the amendment was permissible and sufficiently timely. It is uncontroverted in the pleadings that, once RML filed its October 1988 petition, MCL (through counsel) immediately contacted Ralph Marler, who then recollected his 1986-1987 assent to Crossley and advised that he would discuss the matter further with his family.[21] However, the further negotiations were unavailing, so MCL filed its amendment in early January 1989.[22]

27. Under Section 73.3522 of the Commission's Rules, 47 CFR § 73.3522, an applicant must demonstrate "good cause" for a post-designation amendment by showing "that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues would be necessary; that the proposed amendment would not disrupt the orderly conduct of the hearing; [and] that the other parties will not be unfairly prejudiced . . . ." *Erwin O' Conner*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).[23] Since MCL propopsed to change its antenna site engineering, it was also subject to the stricter "foreseeability" test for engineering amendments set out by the Commission in § 73.3522(b)(1). *Royce Int' l Broadcasting Co. v. FCC*, 820 F.2d 1332 (D.C. Cir. 1987); *Shoblom Broadcasting Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983) (subsequent affirmances omitted); *California Broadcasting Corp.*, 90 FCC 2d 800, 808-809 (1982). MCL meets most of the *O' Conner* elements without difficulty: its amendment was not necessitated by a voluntary act; as its amendment specified the approved site of QRW, no modification or addition of issues was necessitated, nor would it disrupt the hearing; no unfair prejudice would accrue to the other parties (*e.g.*, no upgraded signal coverage). [24]

28. The sole remaining question -- usually critical and so considered by the ALJ here -- is whether MCL exercised "due diligence" in amending to its new site. In his memorandum rejecting MCL's site amendment, the ALJ felt they had not. He stated that MCL had notice on October 17, 1988 that the Marler property was unavailable, "yet MCL did nothing. They waited until January 1990 to move to a new site. That isn't due diligence." However, the unrefuted evidence shows MCL did not "do nothing" (the Marlers engaged in further discussions); MCL did not wait until January 19, 1990 "to move to a new site" (that was merely the amendment date), but needed time to negotiate for a new site when a resolution with the Marlers seemed increasingly unlikely. All in all, this case does not resemble *Shoblom* (on which the ALJ relied), where the applicant knew "fourteen months before designation for hearing . . . that its originally proposed site was unavailable." 93 FCC 2d at 1029. Nor does it resemble *Berea Broadcasting Co., Inc.*, 4 FCC Rcd 8813 (Rev. Bd. 1989), where we rejected an amendment be-

cause the applicant knew in July 1987 (at the latest) that the property specified had been sold, did not contact the new owner, but sought in May 1988 to amend. Nor does it resemble our recent *Texas Communications Limited Partnership*, FCC 90-90, adopted October 1, 1990, where the applicant learned in September 1987 (two months after application filing) that the FAA had rejected its transmitter site, but did not file an amendment until April 1989. *See also Midwest St. Louis, Inc.*, 79 FCC 2d 519 (1980) (rejected amendment filed over one year after notification of loss of site).

29. As we recently recited in *Texas Communications*, "due diligence" dates "from the time the applicant is, or should have been, apprised of the problem requiring amendment." *id.*, at para. 3 (quoting *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982)). Perhaps MCL should not have burned several weeks communing with the "forgetful" Marlers, and begun its quest for a new site the instant confronted with Lois Marler's terse declaration. Instead, they spent several prehearing weeks attempting to have them honor Ralph Marler's 1986-1987 accord. But that is hindsight; and under all of the specific facts and circumstances present here, we believe MCL displayed "due diligence" within the purport of precedent and FCC policy. We grant this MCL exception, accept its amendment (*nunc pro tunc*), and move on.[25]

30. *Diversification/Integration*. Pursuant to the ALJ's *Prehearing Order* of September 16, 1988 (and as we have discussed at length, *supra* para. 16), MCL filed its "Integration Statement" proposing that Ralph Crossely (its 95% equity holder and sole "general" partner) would be its station's full-time general manager, and would resign his (then) current position as (assistant) sales manager of stations WAOK/WVEE, Atlanta to do so.[26] Indeed, MCL had earlier signaled Crossley's intent to be its general manager by so designating him on the FCC Form 396-A (EEO) submitted with its application [27]; it corroborated this manifestation in both its "Integration Statement" and (unlike the hapless RML) it repeated its proposal in the hearing exhibits it proffered for exchange.[28] However, the ALJ struck Crossley's "integration" pledge from the exhibits, [29] and held that Crossley's (then) current position as sales manager at the Atlanta stations was attributable to MCL for media diversification purposes (resulting in a comparative demerit, *I.D.*, para. 183[30]), because Crossley had not pledged to "divest" his "media interest" in WAOK/WVEE by the "B" cut-off date. It followed, held the ALJ, that inasmuch as Crossley must be regarded constructively as clinging to his "media interest" in the Atlanta stations, he is wholly ineligible for "integration" credit here. *Id.*, paras. 260-262.

31. In reviewing MCL's exceptions, it is useful to adumbrate the principles that have developed to assure that "diversification" and "integration" factors are properly calculated, with safeguards against the gamesmanship of "upgrading" in the midst of a proceeding. Since media diversification is a primary objective of the 1965 *Policy Statement*, an attributable media interest elsewhere will be charged against an applicant for an additional station unless a clear, unequivocal divestiture pledge is tendered prior to the "B" cut-off date. *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794-795 (Rev. Bd. 1984) (subsequent history omitted); *compare also, e.g., J. T. Parker Broadcasting Corp.*, 5 FCC Rcd 4651 (1990) (no diverstiture pledge made prior to "B" cut-off) *with Pueblo Radio Broadcasting Service*, 5 FCC Rcd 4829, 4829-4830 (Rev. Bd. 1990) (divestiture pledge(s) honored; no diversification demerit assessed). As to ownership "integration":

> Applicants have the burden of proof to establish how they will effectuate their integration proposals. The current employment status of an integrated owner is relevant to determine the applicant's ability to effectuate its proposal, *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 ¶ 9 (Rev. Bd. 1987), *rev. denied* 3 FCC Rcd 4522, 4522 ¶ 3 (1988).

Cuban American Limited, supra, 5 FCC Rcd at 3785. In the cited *Kennebec Valley*, we clarified and explained at length that a corollary of the "integration" burden is that, where an applicant principal holds a current employment position, a pledge to resign will not be generally inferred; so applicants would be prudent to expressly divulge a pledge to resign, lest we find that the individual's other commitments will impede the fulfillment of an "integration" pledge. *See id.*, 2 FCC Rcd at 1241-1242.[31]

32. With those principles as a backdrop, we hold (1) that no "diversification" demerit should have been visited upon MCL; and (2) that full "integration" credit would be due MCL, in accord with the unchallenged "contingent" findings of the ALJ. *I.D.*, paras. 263-266. MCL is absolutely correct that, inasmuch as Crossley's employment position at WAOK/WVEE was (and is) not a reportable or attributable "media interest" on the FCC application form, "the B cut-off deadline can have no applicability when the information concerning an applicant's comparative qualifications is not required to be reported in the application form." *J. T. Parker Broadcasting*, 5 FCC Rcd at 4651. Crossley was not required, prior to the "B" cut-off, to pledge to "divest" of his employment. That pledge, pursuant to *Vacationland Broadcasting*, *supra* note 15, *Kennebec Valley*, and the *precise* language of the *Prehearing Order* in this very case (*see supra* para. 16) was to come in MCL's "Integration Statement." MCL asserts without refutation that Crossley so pledged therein.[32]

33. Having treated favorably with MCL's exceptions as to its transmitter site and its "diversification"/"integration" profile, it is now necessary to address a problem that might moot its success with its own exceptions.

34. *Financial Issue*. Gonzales complains that MCL was the unjust beneficiary of the ALJ's refusal to a add a basic financial qualifications issue against MCL, based on its April 13, 1989 petiton to enlarge the issues.[33] Therein, and based on Crossley's own hearing testimony, Gonzales asserted that the letter from Bank One, Indianapolis, Indiana, upon which MCL apparently relies for its "firm commitment" for financing is "nothing more than an accommodation letter" issued at the behest of Lee Perkinson, MCL's 5% principal. In support of this contention, Gonzales notes: (1) "when MCL's 95% owner, Ralph Crossley, certified to MCL's financial qualifications, he was relying upon a telephone conversation he had had the previous day with Anthony Schlichte, vice president and senior loan officer of Bank One. Tr. 5853-54"; (2) "The only documents Crossley sent to Schlichte were a financial statement, accompanied possibly by a handwritten letter and a resume. Tr. 5914-15. Crossley had not provided Schlichte with a budget at the time Schlichte signed the 'reasonable assurance' letter. Tr. 5854-55"; (3) "The Bank One Letter, as admitted into evidence as QRW Ex. 4, was partially redacted. On cross-examination at

hearing, Crossley was asked about the redacted portions of the letter. To his recollection, the letter did not require a stock pledge. Also to the best of Crossley's recollection, the bank did not call for the loan to be guaranteed. Tr. 3954. The unredacted portion of the letter does not set forth (a) any collateral, (b) repayment schedule, or (c) interest rate. What it does state is that the bank's willingness to provide the loan 'is expressly subject to our final review of the project plans and projections, and further subject to our favorable review of a complete loan application supported by the then most recent financial statements and projections of the company submitted after grant of your construction permit by the Federal Communications Commission'"; and (4) "Bank One has provided many such letters to other broadcast applicants in which Skywave holds an interest. *See* Deposition of Leon R. Perkinson (a.k.a. Lee Perkinson), February 16, 1989, at Tr. 82-83, 126." [34] MCL replies that "the bank officer, Anthony P. Schlichte, stated that he 'provided Mr. Ralph Crossley with a letter from the Bank intended to provide him with reasonable assurance of the availability of a loan in the event the application he was proposing to file with the FCC was granted'"; and that "Mr. Schlichte stated that although MCL's 5% limited partner, Skywave, had introduced Mr. Crossley to the bank, the bank would not 'have issued a fraudulent and meaningless letter to please Skywave or any other customer. The letter to Mr. Crossley was issued in good faith.'" [35]

35. As has been recognized, the Commission's 1981 revision of its application form, substituting financial "certification" in lieu of actual documentation, invited another plague of abuse. *See Revision of Application for Construction Permit*, *supra* note 7, 4 FCC Rcd at 3858-3860. These abuses had been earlier noted in a *Public Notice*, 62 RR 2d 638 (1987), citing *Dutchess Communications Corp.*, *supra*, perhaps the first case in which the Board confronted a new breed of bank letters allegedly relied upon for financial certification. Unlike the pre-1981 bank letters (which were often merely technically deficient, *e.g.*, as to precise interest rate or repayment periods, and easily amenable to immediate amendment by the substitution of a more detailed letter, *see, e.g.*, *Scioto Broadcasters*, 5 FCC Rcd 5158 (Rev. Bd. 1990); *Orange Nine, Inc.*, 7 FCC 2d 788, 793 (1967)), we began to see quintessential "accommodation" letters issued by bankers to virtual strangers. Indeed, in return for these letters, it appeared that the strangers had submitted to the bank almost nothing in the way of a financial statement, a business plan, a showing of collateral (the *sine qua non* of any bank loan), credit history of the borrower, *etc.*, *etc.* While some of these letters, on their surface, contain boilerplate detail (as to interest rates, *etc.*), it emerged that no substance whatever stood behind the bank letter. Many were no more than official-sounding invitations to someday apply for a loan, invitations on which hundreds of millions of marketing dollars are spent every year by banks in newspapers, in the broadcast media, and in dinnertime "cold-calls." Often, as in *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990), the recipient of such an "accommodation letter" knows full well at certification that the letter is meaningless.

36. As we have recently repeated time-and-time-again in response to this phenomonon, "[a]lthough an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978)," we have patiently explained that:

> in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)), that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successul "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g., Rebecca Boedker*; *supra*, *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7945, 7946 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, we have found such "reasonable assurance." *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

Scioto Broadcasters, 5 FCC Rcd at 5160-5161.

37. Based on the pleadings and the underlying record in this case, most particularly Crossley's own testimony, substantial and material questions are laid bare as to the substance behind MCL's letter from Bank One. Far be it for the Board to suggest that Schlichte would issue a "fraudulent or meaningless letter" or to doubt his "good faith"; but if Crossley's testimony is true (and we assume it is), we are puzzled as to how Bank One could have assessed the "indiviudal qualifications" of Crossley (and/or MCL), *see Christina Communications*, as to the collateral required and offered, or any other rudimentary element behind the bank's "firm commitment." *See Marlin Broadcasters of Central Florida, Inc.*, FCC 90-320, released October 4, 1990 (at paras. 3-6). An issue will be added and tried to determine whether MCL had "reasonable assurance" of a "firm commitment" for Bank One funds when it certified.[36]

(1) METROPOLITAN MANAGEMENT CORPORATION

(2) QRW PARTNERS LIMITED PARTNERSHIP

38. For much the same reason as we vacate the "false financial certification" findings against MCL (based solely on its *transmitter site* issue, *see supra* para. 23 & note 25), we are compelled to vacate the adverse "integration" findings and conclusions set forth in the *I.D.* against MMC and QRW. Anent both applicants, the ALJ denied ownership/management integration, based heavily on perceived problems with their finances. Yet, as with MCL, no financial issue was added or tried against either.

39. Distilled, perhaps, to its essence, the APA contains two immutable prerequisites to full and fair adjudication: (1) adequate notice; and (2) a right to be heard. We emphasized these points, for example, in *Tequesta Television, Inc.*, 64 RR 2d 497, 498 (Rev. Bd. 1987), where we advised that it is inappropriate to reach through the backdoor of comparative "integration" the more basic qualifying issues. We said there that specific issues must be added, so that the parties have adequate notice of what the trial is about, and then fully tried so that all probative evidence regarding that specific issue is placed on record. To similar effect is *West Coast Media, Inc. v. FCC*, 695 F.2d 617 (D.C. Cir. 1982), where the court vacated a conclusion of misrepresentation reached without benefit of a designated issue. The court, hence the Board, looks for adequate notice.

40. Here, and while the *I.D.* makes animadversions to the finances of MMC (*see id.*, paras. 137-140) and QRW (*see id.*, paras. 147-148), no financial issues were added. Rather, based in indeterminate part on perceived deficiencies in the financing of both applicants, all "integration" credit was denied.[37] A kindred problem also afflicts the denial of "integration" credit to MMC, in large part (apparently) because of "stone wall discovery during the pretrial" as well as incomplete local publication (*see I.D.*, paras. 136, 141). Again, however, no rule violation (or "ineptitude") issues were added, *see, e.g., George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982) (subsequent history omitted); and, once again, these perceived deficiencies were taken out of the applicant's "integration" standing. All of this was error.[38]

41. Inasmuch as our remand will require the preparation of a supplemental initial decision, and in the wake of our vacation of the "integration" findings and conclusions attaching to MMC and QRW, the ALJ must reconsider their "integration" proposals without the coloration of matter not within the customary and reasonable purview of the standard comparative issue. We believe that the record is sufficiently complete without actual retrial of these two "integration" proposals, and that no further hearing will be necessary for the ALJ to reassess and record his findings and conclusions with respect to those two applicants. At the same time, we do not estop the ALJ from adding and trying any issue (*e.g.*, finances; rule violations) if substantial and material questions of fact require the ventilation of such concerns. Such is always within the sound discretion of a Commission ALJ. *See, e.g., Modesto Broadcast Group*, 5 FCC Rcd 4674 (Rev. Bd. 1990); *cf. Welch Communications*, FCC 90M-2746, *supra* note 35 (ALJ).

42. ACCORDINGLY, IT IS ORDERED, That the unopposed petition for leave to amend filed April 17, 1990 by Mableton Broadcasting Company, Inc. IS GRANTED, and the amendment IS ACCEPTED;

43. IT IS FURTHER ORDERED, That the "Motion to Accept Late-filed Exceptions and Brief" filed May 14, 1990 (and supplemented May 16, 1990) by Metropolitan Management Corporation and the unopposed "Motion for Leave to File Supplement" filed August 24, 1990 by QRW Partners, Limited Partnership ARE GRANTED, and the respective exceptions, brief, and supplement ARE ACCEPTED;

44. IT IS FURTHER ORDERED, That the "Motion to Strike Exceptions and to Dismiss Application" filed May 15, 1990, the "Motion to Strike Late-filed Comments" filed May 21, 1990, both filed by QRW Partners Limited Partnership, and the "Motion to Strike Exceptions" filed May 24, 1990 and the "Motion to Strike" filed August 10, 1990, both filed by Bolton Broadcasting, Ltd. ARE DENIED; and

45. IT IS FURTHER ORDERED, That this proceeding IS REMANDED for further hearing and the preparation of a Supplemental Initial Decision consistent with this opinion.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] As to the four other applicants whose exceptions are not specifically discussed herein, the Board believes that no futher action is warranted at this time; those exceptions will be treated in our final decision.

[2] *See* MBC Exceptions at 18-19; Gonzales Exceptions at 16-36; Voth Exceptions at 11-19; RML Exceptions at 29-45; Jelks' Exceptions at 23-26; QRW Exceptions at 23-31; MCL Exceptions at 23-26.

[3] BBL Reply at 4.

[4] *See also* Tr. 1815-1816; 2055.

[5] Gonzales Exceptions at 29.

[6] There are many more indicia in the record to support the proposition that Bolton has not had, and will not have, complete control of BBL (or its hypothetical station), *see supra* note 2 (exceptions referenced therein).

[7] Brief for Appellee at 6-7, *Spectron Broadcasting Corp. v. FCC*, 858 F.2d 774 (D.C. Cir. 1988) (Table), *cert. denied*, 109 S. Ct 1140 (1989). Acutely aware of the manipulation of its comparative process through the use of sham ownership structures, the Commission launched a 1989 spring offensive to curb such abuses, one of the salients of which was its *Revision of Application for Construction Permit*, 4 FCC Rcd 3853, 3856 (1989) (footnotes omitted), where it stated:

> We have been faced with an increasing number of cases in which real parties-in-interest seek construction permits through "sham" corporate or partnership applicants. In *KIST, Corp.*, for example, we affirmed the Reivew Board's denial of an integration credit to an applicant

where 95% of its stock was held by a minority female. The Board found she was not the true and actual owner for integration purposes. Rarther, it found the 5% stockholder, who made a gift of 95% interest in the corporation to the minority female, guaranteed the bank loan and provided $70,000 to prosecute the application, was the real owner for integration purposes. Similarly, integration preferences have been denied in several other cases in which it was determined that an applicant's organizational strucuture was erected to take advantage of a comparative preference. While the *KIST* 5% shareholder holds an attributable interest and would therefore be identified in a Form 301 application, a 4% shareholder, who need not currently be identified, could easily perpetrate the same scheme.

There is the potential for similar abuse in limited" partnership arrangements. In *Louisiana Super Communications Ltd.*, for example, the Review Board" discounted an integrated preference to a female "general" partner where it became evident that the "limited" partner would have complete control over the operation and management of the partnership.

It there highlighted also the hallmarks of a number of previous sham applicants, *e.g.* (*id.*, at 3867 n.41):

The limited partner contributed 75% of the equity, petitioned the Commission in his own name to have the channel allocated, hired the consulting firm which prepared the application, signed the contracts for equipment and preparation of the application, hired legal counsel, obtained the transmitter site, advised the general partner on all application decisions (which advice was followed in every instance), prepared the financial plan, entered into a bank agreement to provide the financing, and represented the partnership in negotiations with other applicants. *See also Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978) (although integrated general partners claimed an integration credit was warranted, all financing was provided by the third partner; thus, true and actual control rested with that partner); *Payne Communications Inc.*, 1 FCC Rcd 1-52, 1058, 1060 (Rev. Bd. 1986) (integration credit denied where limited partner, *inter alia*, employed a research agency to find general partners with favorable qualitative enhancements for his application); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988) (limited partner provided 99% of the financing and paid for legal counsel who prepared the application and retained engineering consultant); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4097-98 (Rev. Bd. 1988), *reconsideration granted on other grounds*, 3 FCC Rcd 6216 (Rev. Bd. 1988) (general partners materialized shortly before the application was filed, limited partner held a 90% ownership interest and provided every major element of the application including financing, attorneys and its engineer).

[8] BBL Reply at 8.

[9] *But see Proposals to Reform the Commission's Comparative Hearing Process*, 5 FCC Rcd 4050, 4053 (1990), where as an alternative to the complete abrogration of the *Anax* policy, the Commission has indicated:

We will also consider whether it would be desirable to create a presumption that a "passive" owner who undertakes the role of forming, financing and initiating the application should be deemed active for purposes of our comparative evaluation and the circumstances in which such a presumption could be rebutted. Such a presumption could modify our holding in *Coast TV*, FCC 90-120, released April 27, 1990.

The *Anax* policy, deriving from *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), permits the equity interests of "passive investor" principals to be discounted completely from the quantitative and qualitative comparative "integration" calculus. *See , e.g., Victory Media, supra* (characteristics of 10% "active" equity principal extrapolated to 100% for applicant). The recently released *Proposals to Reform* would reverse the presumptions of *Victory*, but these are mere proposals and have no bearing on the instant case.

[10] FCC 90-294, released September 19, 1990, at para. 14.

[11] Several of the exceptors also urge that, inasmuch as Section 5 of the BBL organizing agreement provides that the partnership is subject to "dissolution by the express will of either partner" (*viz.*, "general" partner Bolton or the corporate "limited" partner, Mableton FM Investors), the "limited" partner (and its 5 shareholders) retain effective control of BBL. In the Commission's recent *Metroplex*, it was observed that the "limited" partners there retained the power to withdraw at any time, and that such a power "contemplated the possible exercise of control by the limited partners, contrary to their assertedly passive status." Id., para. 15. *See also Doylan Forney*, FCC 90-297, released September 9, 1990 (at para. 8) ("right to dissolve the partnership" unilaterally (*inter alia*) "gives the limited partners such leverage over the general partners as to belie any contention that the latter are insulated from influence.") Because we find that the overwhelming evidence proves BBL a sham on other grounds, we need not decide whether Section 5 of the BBL partnership agreement, standing alone, warrants attribution of the equity interests of its "limited" partner(s).

[12] But for the fact that our denial of "integration" credit to BBL will likely preclude it from prevailing against the other remaining applicants, our remand here would include abuse of process and/or misrepresentation issues against it and, particularly, William McArthur. *See Carta Corp.*, 5 FCC Rcd at 3702 & n.13; *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7954 & n.18, *review denied*, FCC 90-320, released October 4, 1990. The actions of William McArthur, especially in light of his long-time broadcast experience, raise substantial and material questions as to whether he here intended to defraud the Commission by interposing Bolton as a Potempkin Village for his ownership aspirations, and this issue may be raised again should he appear for licensing at the FCC. Broadcast experience aside, he could not but be aware that BBL is not *the real thing*.

[13] One of the most frequent problems caused by the practice was the phenomenon of *contingent* "integration" proposals, *see, e.g., Inlet Broadcasting Co.*, 5 FCC Rcd 3192, 3194-3195 (Rev. Bd. 1990) (separate statement); *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2438-2439 (Rev. Bd. 1990); *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 690-690 (Rev. Bd. 1984) (subsequent affirmances omitted). In view of the myriad problems caused by allowing the filing of "integration" proposals on the eve of the hearing, when the law otherwise holds that *comparative* proposals must be "frozen" early (at the "B" cut-off date), *Belo Broadcasting*, 68 FCC 2d 1313, 1320 (1978), the Commission has again recently revised its application form and will require the filing of "integration" proposals early in the process. *Revision of Application Form, supra* note 7, 4 FCC at 3860 (1989). Here, of course, all parties filed under the old regime.

[14] *Review denied*, 60 RR 2d 776 (1986), *aff'd per judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987).

[15] In his February 14, 1989 order ultimately rejecting RML's reformation motion, the ALJ cited language in our *Vacationland Broadcasting Co.*, 97 FCC 2d 485, 492 (Rev. Bd. 1984) (subsequent history omitted), to the effect that:

> in the future we will except applicants to specifically state in their direct written cases the precise hour-per-week commitment proposed for each integrated principal. Failure to provide this information or substantial justification for its absence may lead to denial or diminution of the integration credit sought.

However, it is plain from the context that (1) the Board was there merely advising that "integration" pledges must be specific rather than "generalizations," not apotheosizing exhibit exchanges (*see id.*); and (2) the specificity demands made by this ALJ in his instant *Prehearing Order*, and complied with fully by RML, more than adequately met our concerns in *Vacationland*. That case did not contemplate the prefiling of separate and detailed "integration" statements, and it presented no legal bar to RML's reformation under the unusual sequence here. While it is true, hypothetically, that RML's principals might have "changed their minds" about integrating between September and December 1988, it is clear here that they did not, no attempt to upgrade over their "Integration Statement" was proposed, and the failure to repeat the proposals was at most a technical oversight of counsel.

[16] *I. D.*, paras. 260-266.

[17] The full text of the letter from Ralph Marler to Perkinson reads as follows:

> Dear Mr. Perkinson:
>
> I am the owner of [*or representative of the owner of*] property of which you are proposing to operate a broadcast station. I have authority to enter into agreements concerning sale, lease or use of the property.
>
> The property you have expressed interest in is located [*give address or general description or location*]. I understand that you will require an area of 3-5 [acres] to erect and guy your proposed tower, and that you will construct a small building near the tower to house your transmitter. I also understand that you will require access to the transmitter building and tower 24 hours a day.
>
> [*The owner of the property*] is willing to lease your company this property for your broadcast station. We currently anticipate that the lease terms would be approximately* per month. However, these terms are not binding on either party and are subject to entry into a definitive lease arrangement at such time as your company is granted a construction authorization.
>
> I am presently aware of no regulations or agreements which would prevent you from constructing you proposed facilities at the intended location. If any such circumstances come to my attention, or if I find it necessary to withdraw this letter, I will promptly inform you. I understand that this letter may be submitted to the Federal Communications Commission as evidence that you have reasonable assurances that your site will be available.

MCL Opposition To Petition To Enlarge, filed November 7, 1988 (Attachment) (bracketed text in original; lease terms denoted by asterisk in original).

[18] RML Petition to Enlarge Issues, filed October 17, 1988 (Attachment). The full text of the Lois Marler declaration reads as follows:

DECLARATION

> I, Mrs. Lois D. Marler, state and declare as follows:
>
> That I, and my brother-in-law, James Marler, own a certain piece of property located at 1.1 LDM KM SW of the intersection of Macedonia Road and State Route 5.
>
> I have reviewed an application of Mableton Communications, Ltd., which states that this property is available to them for purposes of erecting a radio tower some 106 meters high.
>
> Please be advised that neither my brother-in-law nor I have ever agreed to or authorized anyone to use this property for such a purpose. Since my home is located on this property, we have no intention of making the property available for any other use by this parties.

[19] MCL Opposition, *supra* note 17, at 3.

[20] *Id.*

[21] MCL Exceptions at 15 (citing its January 19, 1989 petition to amend).

[22] We need not speculate on why the Marlers might have backed-off from the May 1986 letter when a competing applicant dropped by (though the motives seem obvious enough), but this is far from the first time the Commission has experienced this equivocation. *See Advanced Technologies*. For an aggravated example, *see generally WIOO, Inc.*, 28 RR 2d 685 (Rev. Bd. 1973).

[23] Relying on *Anax Broadcasting, Inc.*, 87 FCC 2d 843, 848-849 (1981) (and dictum in several subsequent cases), MCL urges that standards of "due diligence" are relaxed for basic qualifying amendments. The *Royce Int'l* court also commented upon this same argument ("Ironic as this proposition may seem -- the more fatal the defect, the more readily an applicant may make corrective amendments," 820 F.2d at 1337). But because we find that MCL has otherwise met the requirements of § 73.3522, we need not discuss whether *Anax* provides additional support for accepting its amendment. We also recognize that the ALJ's *Prehearing Order* asked for amendments within 30 days in response to any petition to enlarge, *see* FCC 89M-453, *supra* (at 2). But MCL's response to the RML allegations was that (1) the Marlers were reconsidering; and (2) if the Marler site had to be abandoned, it was aware of its § 1.65 obligation to notify the forum and amend. We do not read the *Prehearing Order* to have delimited "due diligence," always a case-by-case question, or to have modified *O' Conner*. The ALJ did not do so (he in fact applied *O'Conner)* ; and our critical difference with the ALJ stems directly from his view that Crossley (and MCL) should not have relied on Ralph Marler's 1986-1987 assent to (5% MCL principal) Perkinson. We find that Crossley had every right to rely and claim "reasonable assurance."

[24] MCL (Exceptions at 11 & n.3) contends that, "as shown by the Joint Engineering MCL's population served is the lowest of the applicants because it is the most distant from Atlanta." It is not clear whether (1) MCL is adverting to its proposed QRW site; or (2) if so, its general coverage factor would be reduced from its original Marler site. In any event, when and if we reach MCL's comparative case, it would be limited constructively to

the coverage of its original site, if smaller than its QRW site. *Womens Broadcasting Coalition, Inc.*, 59 RR 2d 730, 733 (1986); *see also Dri-Five, Inc.*, 5 FCC Rcd 1292, 1293 (1990).

[25] Having found, in direct contrast to the ALJ, that Crossley had every right to claim "reasonable assurance" to the Marler site, *compare I.D.*, para. 67, the adverse findings and conclusions against MCL on the "false financial certification" issue fall of their own weight. Although we immediately herein *do* (in text) add a financial issue against MCL on entirely different grounds, the *I.D.* did not explore at all MCL's financial resources; rather it based its holding purely on the fact that Crossley and Ralph Marler "had never met," and that therefore MCL's financial certification was "based on such a frail factual predicate." *See id.* The transmitter site issue(s) added against MCL did not mention (or suggest) a financial component, and this sort of short-cut to financial disqualification cannot be affirmed. (*See also infra* paras. 37-39.)

[26] *See* MCL Exceptions at 22.

[27] *Id.*, at 19. The Board has indicated that it considers the designation of an individual position on Form 396-A (EEO) as tantamount to an "integration" pledge, which cannot be rescinded without an application amendment. *Sarasota-Charlotte Broadcasting Corp.*, 5 FCC Rcd 3837, 3838-3839 (Rev. Bd. 1990). The Commission takes very seriously the EEO obligations of its licensees, *see Catoctin Broadcasting Corp.*, 2 FCC Rcd 2126 (Rev. Bd. 1987) (subsequent history omitted); and it is patent that the designation of an individual (and that person's position at the station) as the party who will oversee EEO is (unless amended) an affirmative pledge to the FCC. To the extent that the individual so designated is also an owner, part of an applicant's "integration" pledge is necessarily revealed, especially (as with MCL and in *Sarasota-Charlotte)* if the individual is identified as the proposed general manager of the station.

[28] MCL Exceptions at 22.

[29] *See id.*

[30] The signals of the Atlanta stations and Crossley's proposed Mableton station will overlap.

[31] Although, as in *Kennebec Valley* (and the cases cited therein), abandonment of conflicting business interests will not generally be inferred, the *Kennebec* Board refused to draw a "go/no-go" line on whether we can infer that "a current employment position will be dropped or will not be dropped in order to effectuate an integration pledge." 2 FCC Rcd at 1242. In fact, in the earlier *Rahu Broadcasting, Inc.*, 56 RR 2d 285 (Rev. Bd. 1984), we affirmed an ALJ who refused to assess a diversification demerit, and also awarded "integration" credit, to an applicant who was currently employed by another (and prospectively competing) station in that same market; retention of that employment position was inferred to be "exceedingly unlikely." But, we need not and do not rely on *Rahu* here, because Crossley's resignation was explicitly promised by him in a timely fashion.

[32] *See* MCL Exceptions at 18-19.

[33] Gonzales Exceptions at 43-44.

[34] *Id.*

[35] MCL Reply at 2. The ALJ did not address Gonzales' petition to enlarge on the merits; rather, accusing it of "Rambo" tactics for not filing its petition until after Crossley's testimony, the ALJ rejected that petition as untimely (just as he rejected on the same grounds a spate of enlargement petitions of other parties here). *Memorandum Opinion and Order*, FCC 89M-1457, released May 15, 1989. Even if Gonzales' petition were untimely, the law is well-settled that the question of whether or not to add an issue depends on the substance of the complaint and its public interest impact. 47 CFR § 1.229(c) (embodying *Edgefield-Saluda*, 5 FCC 2d 148 (1966)). Adverse evidence adduced at hearing frequently gives rise to the addition of an issue. *See, e.g., Welch Communications, Inc.*, 5 FCC Rcd 4850 (Rev. Bd. 1990) (financial issue added on basis of applicant testimony). *See also* FCC 90M-2764, released September 4, 1990 (post-hearing, post-initial decision, post-Board remand financial issue added in *Welch* case by ALJ, *sua sponte*, based on previous record evidence ignored by ALJ and not the subject of exceptions to the Board).

[36] Unlike *Orange Nine* (or the multitude of similar pre-1981 cases), or the more recent *Scioto Broadcasters*, where mere technical deficiencies beset bank letters actually attending the FCC application (thus allowing for free and easy correction within 30 days of discovery of the minor flaw), we do not permit financial amendments without a "good cause" (§ 73.3522) showing where there exists the organic question as to whether a "certification" had any legitimate basis *ab initio*. *See Marlin Broadcasters, supra*, FCC 90-320 (at para. 11 & n.9; *see also Albert E. Gary*, FCC 90R-96, adopted October 5, 1990; *Shawn Phelan*, 5 FCC 2d 2622 (Rev. Bd. 1990) (*citing Pepper Schultz*, 5 FCC Rcd 3273 (1990); *Opal Chadwell*, 4 FCC Rcd 1215, 1217 (1989) (applicant must show "reasonable basis" for *original* certification before making "good cause" showing for amendment); *Rebecca Boedker, supra*.

[37] That is not to say that, in assessing the *bona fides* of an ownership structure to determine the fundamental validity of "integration" proposals, it is improper to observe and report that a putatively controlling principal has scant knowledge of its applicant's basic financial structure. We have done so many times, *see, e.g., supra* paras. 8-10; *Carta Corp.* But it is a wholly different thing to question the bedrock legitimacy or sufficiency of a funding loan solely under the aegis of a standard comparative issue. For that, a discrete financial issue is necessary, *see supra* note 25.

[38] We also note that, as recently reiterated in *Washoe Shoshone Broadcasting*, FCC 90-293, released September 17, 1990 (at para. 19), the Commission's policy has changed so that, if rule violations are not so serious as to disqualify new applicants for facilities, no comparative "demerits" are assessed. It is now "go"/"no-go." *Professional Radio, Inc.*, 2 FCC Rcd 6666 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re applications of

INLAND CELLULAR TELEPHONE COMPANY — File No. 10325-CL-P-399-B-88

AMERITECH MOBILE COMMUNICATIONS, INC.

ILLINOIS CONSOLIDATED TELEPHONE CO.

For a license to cover construction permit to operate on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Illinois RSA 6 - Montgomery Market 399

AMERITECH MOBILE COMMUNICATIONS, INC. — File No. 10326-CL-P-400-B-88

ILLINOIS CONSOLIDATED TELEPHONE CO.

For a license to cover construction permit to operate on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Illinois RSA 7 - Vermilion Market No. 400

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1990; Released: October 29, 1990

By the Chief, Mobile Services Division:

1. Ameritech Mobile Communications, Inc. (Ameritech), Illinois Consolidated Telephone Co. (ICTC) and Inland Cellular Telephone Co. (Inland) were applicants in the wireline lottery for Illinois RSA 6, cellular market 399. Ameritech and ICTC were also applicants in the wireline lottery for market 400. Both lotteries were held May 25, 1989. Prior to the lottery, Odin Telephone Exchange, Inc. (Odin) and Wabash Telephone Cooperative, Inc. (Wabash) jointly filed a motion to have the several lottery chances of Ameritech, ICTC and Inland for market 399 combined into one chance for the lottery. Ameritech, ICTC and Inland filed a joint opposition to the motion. Similarly, Wabash and Flat Rock Mutual Telephone Company (Flat Rock) (Odin, Wabash and Flat Rock are hereafter referred to as "Petitioners") jointly submitted an identical motion to reduce lottery chances of the referenced applicants for Illinois RSA 7, market 400. Ameritech and ICTC also jointly opposed that motion.[1]

2. In addition, Ameritech, Montrose Mutual Cellular Telephone Company (Montrose), Wabash, Odin, Alhambra Grantfork Cellular Telephone Company (Alhambra) and Flat Rock filed a petition for waiver of Section 22.922(a) of the Commission's rules to permit an exchange of interests in the applications for RSA markets 399 and 400.

I. BACKGROUND AND CONTENTIONS

3. Ameritech, Odin. Inland, Wabash, Alhambra and Montrose filed applications to participate in the Illinois RSA 6 (market 399) wireline lottery. Inland was selected as the winning applicant. Ameritech, Wabash, Flat Rock and Montrose, among others, filed applications to participate in the Illinois RSA 7 (market 400) wireline lottery. Ameritech was selected as the winning applicant in that market. The settling parties in both markets determined that it would be more efficient to operate Illinois RSAs 6 and 7 under the control of a combined limited partnership rather than separately. Settlement agreements to accomplish this goal were entered into for each market. In order to bring ownership of the two licenses under the control of the Illinois RSA 6 and 7 Limited Partnership, the parties have requested a waiver of Section 22.922(a) of the rules. This request is necessary, the parties state, because Odin and Alhambra have interests in RSA 6 but not RSA 7, and because Flat Rock has an interest in RSA 7 but not RSA 6.[2] The parties maintain that the transfer of minority limited partnership interests in RSAs 6 and 7 will not thwart the objectives of the Commission's alienation rules. The applicants state that no new entities are members of the partnerships, the proposed transfer is not a result of speculation in cellular licenses and there will be no delay of service to the public by granting the request.

4. According to the Petitioners, Ameritech, ICTC and others entered into a Limited Partnership Agreement which commits them to operate markets 399 and 400 as a combined venture. These parties, Petitioners contend, did not file independent applications, but claimed multiple lottery chances on behalf of and for the benefit of the Springfield, Decatur, Bloomington/Normal and Champaign/Urbana/Rantoul MSAs which they jointly operate. Petitioners argue that Ameritech, ICTC and Inland would receive a cumulative three chances in the lottery for market 399 instead of a combined chance of one and that Ameritech and ICTC would receive two chances instead of a combined one for market 400.

5. In response, Ameritech, ICTC and Inland maintain Petitioners' motion lacks legal merit and is inconsistent with the Commission's policy of encouraging full or partial settlements by eligible wireline companies. Applicants state that the pre-filing agreement was disclosed fully in the applications, that only eligible wireline carriers filed applications, and that the Illinois Partnership agreement pre-dated the filing of the applications and covers service areas other than Illinois RSA 6 and 7. Furthermore, applicants maintain that neither the Commission's rules nor its policies prohibit wireline carriers that enter into prefiling agreements from filing independent applications for purposes of the lottery and receiving cumulative chances. Applicants note that each filing party's applica-

tion states that "if the Commission does not approve the pre-filing agreement [it is] ready, willing and able to build the cellular system as proposed."

II. DISCUSSION

6. The Commission has permitted and encouraged wireline pre-filing settlement agreements resulting in the award of cumulative chances in lotteries, provided that the applications are *bona fide* and individually acceptable.[3] In adopting rules for the rural cellular service, the Commission did not eliminate full or partial settlements for wireline applicants. It is Commission policy that wireline applicants may enter into full or partial pre-filing settlement agreements in applying for rural service areas. However, wireline applicants that enter into such agreements are required by Section 22.923(b)(7) to fully disclose the details of the pre-filing agreements, listing all applicants that are parties to the agreement and specifying their ownership interests in the application, even interests of less than one percent.[4]

7. After a careful review of the subject applications, we find that the settlement agreements in rural service area markets 399 and 400 and the award of cumulative chances were proper. We also find that Ameritech, ICTC, and Inland submitted *bona fide* proposals to provide cellular service and did not file with the goal of improperly cumulating their chances. The applications filed (1) contained complete details of the pre-filing agreement, (2) were independently prepared with each applicant expressing a willingness to proceed with cellular construction and operation if selected in the lottery and the settlement agreement was disapproved, (3) and fully disclosed the principals and their ownership interests in the applications.

8. Moreover, we find that grant of the request for waiver of Section 22.922 of the Commission's rules will not undermine the goals which the Commission wished to achieve when it adopted the alienation rules. There is no evidence that the applications were filed with the intent to speculate in RSA applications, nor will approval of the waiver delay implementation of service to the public. The proposed transfer of interests is part of an agreement by which Illinois RSAs 6 and 7 will be combined and operated on a joint basis under the control of the Illinois RSA 6 and 7 Limited Partnership. We agree with the applicants that this transaction is merely an exchange of interests to facilitate common ownership of the cellular licenses in markets 399 and 400 and does not involve a substantial change in ownership or control of the markets in violation of Commission rules or policy.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, that the applications of Ameritech Mobile Communications, Inc. (File No. 10326-CL-P-400-B-88) and Inland Cellular Telephone Company (File No. 10325-CP-P-399-B-88), as amended, ARE GRANTED. These authorizations do not include the right to any interference protection in any areas outside Illinois RSAs 6 and 7 and are also conditioned upon coordinating with current or future co-channel licensee(s) in the areas outside the RSAs. Ameritech and Inland are on notice that in the event current or future MSA/RSA licensees encounter interference from any subsequent service extensions, Ameritech and Inland will have to change frequencies in those cells or reduce their 39 dBu contours to eliminate any interference.

10. IT IS FURTHER ORDERED, that the Motions to Reduce Lottery Chances of Specified Applicants filed by Odin Telephone Exchange, Inc., Wabash Telephone Cooperative, Inc., and Flat Rock Mutual Telephone Company ARE DENIED.

11. IT IS ALSO ORDERED, that the Petitions for Waiver of Section 22.922(a) of the Commission's rules ARE GRANTED and that the provisions of Section 22.922 ARE WAIVED as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Ameritech Mobile, ICTC, and Inland also filed a motion to strike the motion to reduce lottery chances.

[2] Section 22.922(a) of the Commission's rules prohibits "the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas. . . prior to the grant of a construction authorization."

[3] *Cellular Lottery Rule Making*, 98 FCC 2d 175 (1984), *Cellular Radio Lotteries*, 101 FCC 2d 577 (1985); *Public Notice*, Report No. CL-291 (released April 10, 1985).

[4] *Amendment of the Commission's Rules for Rural Cellular Service*, Third Report and Order, 4 FCC Rcd 2440 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE TELEPHONE COMPANIES — AAD 90-24

Petition for Waiver of Section 32.27(c) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1990; Released: October 29, 1990

By The Deputy Chief, Operations, Common Carrier Bureau:

I. INTRODUCTION

1. On September 17, 1990, the GTE Service Corporation and its affiliated domestic telephone companies (GTOCs) filed a petition for waiver of Section 32.27 (c) of the Commission's Rules.[1] This Section requires that in the absence of an applicable tariff or prevailing price list that is held out to the general public, proceeds from assets sold or transferred to nonregulated affiliates must be recorded at the higher of cost less all applicable valuation reserves (net book value) or fair market value. The waiver requested by the GTOCs would allow them to sell retired telephone equipment to certain foreign affiliates at prices that are less than the net book value of the equipment at the time it was retired.

II. THE PETITION

2. The GTOCs are contemplating the sale of retired equipment to foreign affiliates, including Compania Dominicana de Telefonos (CODETEL), and, possibly, The British Columbia Telephone Company or The Quebec Telephone Company. The equipment consists mainly of No. 2 and No. 3 EAX Switches, but also includes circuit equipment, test equipment, and other miscellaneous items that have been retired (removed from service) by the GTOCs in the normal course of business.

3. The GTOCs assert there is a very limited re-use market for the kind of equipment that would be sold and that the fair market value of the equipment in the United States is little more than scrap value. However, CODETEL is willing to pay a price above the fair market value for the equipment it would purchase to meet its specific needs. If the equipment is not sold to CODETEL, the GTOCs believe the only alternative would be to sell the equipment to dealers at a price below what CODETEL is willing to pay. If this occurs, ratepayers would be harmed because less proceeds would be realized than if the equipment were sold to CODETEL.

4. The GTOCs believe that if measurement of net book value is made after the equipment is retired, a waiver may not be necessary. The GTOCs believe that the regulatory accounting treatment applicable to telephone equipment retirements effectively reduces the net book value of retired equipment to zero.[2] If the net book value is zero, Section 32.27 (c) would allow the sale to be consummated at the price CODETEL is willing to pay.

5. If for the purposes of applying Section 32.27 (c), the net book value of property retired in the normal course of business is not zero, the GTOCs request a waiver to permit them to sell the equipment to nonregulated affiliates when: (a) the equipment has been retired in the normal course of business, (b) the fair market value has been duly established, and (c) the amount received from the affiliate exceeds the fair market value. In order to determine fair market value, the GTOCs would solicit bids in the normal course of business for each asset type. Where a higher price can be realized by sale to an unaffiliated party, sales would be made to those parties. [3]

III. DISCUSSION

6. Contrary to the theory forwarded by the GTOCs, our accounting rules do not effectively reduce the net book value of retired assets to zero. The asset account and related accumulated depreciation account are reduced by the same amount in the retirement entry (*See* note 2, *supra*.). The net book value remains unchanged by this entry. The excess of the original cost over the accumulated depreciation simply moves between accounts both of which are used in the calculation of net book vaiue. While group depreciation practices assume that the net book value of assets retired in the normal course of business will be zero in the aggregate and over time, an individual retirement entry does not produce this result. Since the net book values of assets retired individually and in groups does not produce a zero net book value for these assets, a waiver is necessary.

7. The purpose of Section 32.27 (c) is to protect the interests of ratepayers in sales or transfers of telephone company assets to nonregulated affiliates.[4] The requirement to record sales and transfers at the greater of net book value or fair market value ensures that ratepayers suffer no loss on the sale or transfer as a result of dealing with nonregulated affiliates, and that the regulated entities reap the benefit of any appreciation in asset values.

8. In the *Joint Cost Order*, the Commission acknowledged that unusual circumstances might arise in the pricing of affiliate transactions pursuant to Section 32.27, which could work a hardship on ratepayers.[5] In such circumstances, the Commission indicated it would consider waiver requests. The transactions contemplated by the GTOCs, subject to terms and conditions they propose, would leave ratepayers no worse off than if the assets were sold to unaffiliated third parties. The assets have been retired in the normal course of business, the market value would be established through the solicitation of bids, and the amount received from CODETEL and the other affiliates for these assets would exceed the fair market value. If better prices can be obtained from unaffiliated third parties, the assets are to be sold to third parties. In these circumstances the affiliate would become another bidder, in effect, and for the purposes of these transactions the interests of ratepayers would be adequately protected if we waived Section 32.27 (c) to allow the GTOCs to sell the

retired assets to their affiliates at less than net book value. We will, however, require that the GTOCs provide us with an identification of the assets that are the subject of these sales to CODETEL and any sales to The British Columbia Telephone Company or The Quebec Telephone Company, the determination of the net book values and sales prices, and evidence supporting the adequacy of the establishment of the fair market values. The determination of net book value at the time of retirement, the adequacy of the bid solicitation process, and the transfer prices would, of course, be subject to audit review.

IV. ORDERING CLAUSE

9. ACCORDINGLY, IT IS ORDERED, that the petition of the GTE Service Corporation and its affiliated domestic telephone companies is GRANTED, to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. Section 32.27 (c).

[2] Under Part 32 of the Commission's rules, telephone equipment is depreciated on a "group" rather than "individual unit" basis. 47 C.F.R. Section 32.2000 (g). Upon retirement, the original cost of the retired asset is removed from an asset account and an identical amount is removed from an accumulated depreciation account. 47 C.F.R. Section 32.2000 (d).

[3] GTOCs Petition at 5.

[4] *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (Joint Cost Order); *Recon.*, 2 FCC Rcd 6283 (1987); *Further Recon.*, 3 FCC Rcd 6701 (1988); *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

[5] *See Joint Cost Order*, 2 FCC Rcd at 1336.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 24, 1990

Released: October 29, 1990

David Lynch, Vice President 8210-BH
and General Manager C3-426
WRGB Broadcasting, Inc. C9-412
1400 Balltown Road
Schenectady, NY 12309

Dear Mr. Lynch:

This is in further reference to the Commission's inquiry concerning an allegation that, on March 9, 1989, WRGB(TV) news reporter Judy Sanders placed a telephone call to Edward J. Patterson and recorded the conversation for broadcast without first informing Mr. Patterson of her intention to do so, and that your station broadcast that recording on the same date.

By letter dated September 20, 1990, you responded to our inquiry, acknowledging that your station had violated Section 73.1206 of the Commission's Rules, as alleged. You explained that Ms. Sanders did not realize that the Commission's Rules prohibited her actions. Included with your response was a memorandum explaining the requirements of Section 73.1206, which you state will be distributed to WRGB(TV) employees.

In light of the admission made in your response, we conclude that WRGB(TV) did violate Section 73.1206 of the Commission's Rules. Accordingly, WRGB Broadcasting Inc., licensee of WRGB(TV), Schenectady, NY, IS HEREBY ADMONISHED for failing to notify Edward J. Patterson that a telephone call placed to him by station personnel was being recorded with the intention to broadcast that recording. Based on the information presently available to the Enforcement Division, no further action is contemplated in regard to the subject broadcast. However, it is expected that you will exercise care to assure that such a violation does not recur. Such recurrence may result in the imposition of more severe sanctions. This matter is being made a part of WRGB(TV)'s permanent record.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 18, 1990

Released: October 29, 1990

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Rusk Corporation 8310-HTS
Radio Station KLOL(FM) C1-549
P.O. Box 1520
Houston, Texas 77251

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

We have received complaints indicating that Radio Station KLOL(FM), Houston, TX, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during the "Stevens and Pruett Show." These broadcasts occurred at various times between 6:00 a.m. and approximately 10:00 a.m. on February 5, 1990, February 16, 1990, and on at least one day during the week of March 19, 1990. Relevant excerpts from the programming involved are transcribed in Attachments 1-3 to this letter.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Section 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict, using the same definition of indecency, the daytime broadcast of indecent material. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (" *ACT* ").

We believe that portions of the subject broadcasts of the "Stevens and Pruett Show," as reflected in the attached transcripts, were indecent as they focused on sexual and excretory activities in a lewd, vulgar, pandering and titillating manner and were, in context, patently offensive as measured by contemporary community standards for the broadcast medium. Because they aired at times when there was a reasonable risk that children may have been in the audience (between 6:00 a.m. and 10:00 a.m.), they are legally actionable. Thus, it appears that Station KLOL(FM) willfully and repeatedly violated 18 U.S.C § 1464 by airing indecent material on February 5, 1990, February 16, 1990, and on at least one day during the week of March 19, 1990, during daytime hours. Accordingly, pursuant to Section 503(b) of the Communications Act, Rusk Corporation is hereby advised of its apparent liability for a forfeiture of Six Thousand Dollars ($6,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT 1

Station: KLOL(FM), Houston, TX
Date/Time: February 5, 1990 at 9:00 a.m.
Material Broadcast: Stevens and Pruett Show (Excerpts)

MV: Male Voice
MV2: Second male voice
MV3: Third male voice
FV: Female voice

MV: Subject matter may not be suitable for those under 21 years of age so if you're under 21, please put 101 KLOL on hold for the next hour. If you're over 21, you're going to like this so lock it in, crank it up and rip off the knobs. (Applause)

* * *

MV2: Sex survey lines are open at 390-KLOL. That's right, 390-5565. Today's question, it's a strange question and we hope we have a lot of strange answers. What makes your hiney(?) parts tingle? Should we try this one on line one?

MV3: Your favorite hiney parts.

MV2: What makes your favorite hiney parts tingle?

MV3: I don't know, you want to.

MV2: I don't know.

* * *

MV2: I have a woman on the line, right here.

MV3: OK. Are you ready to answer our question?

FV: Yeah.

MV2: So what makes your favorite hiney parts tingle?

FV: Well, when my husband gets down there and goes (makes noise -lips buzzing).

MV2: Thank you very much. Hi there.

FV: Mr. Stevens?

MV2: Actually Pruett. What makes your favorite hiney parts tingle?

FV: Well, if I answer your question will you answer me one?

MV2: Well sure.

FV: It's not personal.

MV2: Rats, I always like it when it's personal. Well, ask yours and then you got to answer mine.

FV: I don't know if this applies but I love oral sex.

MV3: Uh huh.

FV: And what really turns me on is to do it to a guy. That's what really turns me on, not just any guy but a guy I've been with for a long time.

MV2: How long?

FV: Seven years.

MV2: OK. Well we got to go now, thanks. Hi, hello.

KLOL(FM) February 5, 1990

FV: Hello.

MV2: Can you hear me OK?

FV: Yes, I can.

MV2: What makes you favorite hiney parts tingle?

FV: My boy friends tongue.

MV2: Ahhh. HaHaHa. Thank you very, very much.

* * *

MV: What makes your favorite hiney parts tingle?

FC: Well, my boy friend tried to put Hershey kisses inside of me and tried to lick it out and it took forever for him to do it.

ATTACHMENT 2

Station: KLOL(FM), Houston, TX
Date/Time: February 16, 1990 at 9:00 a.m.
Material Broadcast: Stevens and Pruett Show (Excerpts)

MV: Male Voice
MV2: Second Male Voice
FC: Female Callers
MC: Male Caller

Time: 9:00 a.m.

FC: . . . But you know everybody was doing everybody.

MV: Oh, you mean like an orgy?

FC: Kinda, yeah, a group grope.

MV: A group grope. Have you done that before? I mean many times?

FC: Oh yeah, I'm 32 years old. I've been around lots of times.

MV: I bet you have.

FC: (Unintelligible)

MV: Bet you've been around the block and up the elevator.

MV2: Do you have kids?

FC: Kids? No.

MV: OK, do you do this in your neighborhood?

FC: Oh yeah.

MV2: And it really throws the neighbors, right?

FC: Oh no, they love me.

MV: (Laughs)

FC: I'm red headed. I can't help it.

MV: You mean, oh, you mean you're on fire?

FC: All the time.

MV: Yeah, you're just, do you consider yourself a nymphomaniac?

FC: Absolutely.

MV: Well, what, do you mean group sex is a lot of fun to you?

FC: Yeah.

MV: Do you mean, do you have one partner or more than one partner at a time?

FC: More than one.

MV: There's one now.

MV2: Get that guy off, look if he's, sir, stop it, don't be doing that to her while she's a talking to us. Stop that.

MV: Makes us feel so used.

FC: (Laughs)

MV: Pull that thing out of there, better have numbers on it, thermometers, oh he's, thank you very much.

* * *

KLOL(FM) February 16, 1990

MV: What are your joys of sex?

FC: I love having a threesome and getting it in my mou(interuppted by horn) and in my meow at the same time.

MV: Gee, that's got to be a long one.

FC: No, make it long.

MV: What a spoon?

FC: Pardon me.

MV: A spoon, a fork, what are you talking about?

MV2: I don't know, you say you're dining out and bringing your cat to a, I just don't know what you're talking about.

FC: Oh, come on.

MV: That's it, we just don't understand this.

FC: Oh, come on.

MV: 'Cause if we did there'd be a helluva meeting.

MV2: That's right, so thank you very much.

MV: Yeah, thanks for calling.

FC: Have a good day.

MV: A girl who likes to dine in and.

MV2: And loves animals.

FC: In and out it's both good.

MV: Yeah, lets the cat in, lets the cat out.

ATTACHMENT 3

Station: KLOL(FM), Houston, TX
Date/Time: Week of March 19, 1990, between 8:00 a.m. and 10:00 a.m.
Material Broadcast: Stevens and Pruett Show (Excerpts)

MV: Male Voice
MV2: Second Male Voice
FC: Female Caller

MV: Good morning, who did you want to talk to?

FC: Stevens and Pruett.

MV: Hi, this is Stevens.

MV2: And I'm Pruett.

FC: Well, just thought I'd let you know, talking about those meows. Well, yesterday morning I was trimming and cut half of it off.

MV: Oh, you should have entered shave-a-babe.

FC: Hey, I didn't even think about it until this morning and my boy friend 'cause I live with him, he said, well maybe you should call Stevens and Pruett and tell them they need to find a donator.

MV: Well, we could kiss it and make it.

MV2: No.

MV: No, I don't kiss cats.

FC: Oh well

MV: How about dogs. I like the dogs.

MV2: I scratch them once in a while but I never kiss them.

FC: No, no, now I told him I'd call 'em, tell 'em, maybe they could come up with something. It's the truth.

MV: You mean wherever you were cut your cat is bald?

FC: Yeah, well I was trying 'cause he likes it that way and I was trying to shape it all nice and pretty and everything and my hands kinda slipped and.

MV: Do you think a band-aid would stick?

FC: It's bigger than a band-aid, needs more.

MV: It's.

FC: Needs a gauze pad.

MV: (Unintelligible)

FC: I couldn't even go to work yesterday it hurt so bad.

MV: Maybe you need plaster of Europe.

MV2: How about a catcher's mitt?

MV: I'm sorry, that's so, that's so tacky.

* * *

MV: What do you envy about the opposite sex?

FC: I really envy the sex, the men never have to sleep in the wet spot.

MV: (Laughs) Right.

MV2: It is written.

MV: In the book of yah-hah, in inalienable rights, you have to dance backwards and you'll have to sleep there. Thanks a lot.

KLOL(FM) Week of March 19, 1990

* * *

MV: So what's your point?

MV2: Boner.

FC: Don't have to worry about their figures as much as women or the clothes to wear, not to mention their hair and make-up.

MV: Yeah, well you're not talking about Stevens.

FC: And, of course, men can just whip it out and pee wherever it pleases.

MV2: Now you're talking about Pruett.

FC: They can just roll over and fall asleep while women have to try to sleep in the wet spot.

MV: There we go again, the damn wet spot. Why don't you just change the sheets?

MV2: Well, these are all valid complaints and I'm sure I know, sensitized aware men are.

MV: Just lazy people sleeping on a wet spot, that's just lazy.

FC: Horrible.

MV: While you're at it changing the sheets might as well do the house, you know.

MV2: That's right.

MV: Do your make-up and your hair.

FC: Well, you see I'd have to be the one to change the sheets.

MV: Of course, exactly, then you wouldn't have to sleep in the wet spot.

* * *

MV: Hi.

FC: Hi.

MV: What do you envy about a man?

FC: That they can stand up to take a leak and they don't have to shave if they don't want to.

MV: Well, you don't have to shave if you don't want to and you can stand up if you want to.

MV2: Real women can stand up.

MV: That's right and hit a Coke bottle at 13 yards.

MV2: It'll ruin your pumps.

MV: You're just not a real woman, that's all.

* * *

MV: Stevens and Pruett Show brought to you this morning by the new pancakes that always stay warm.

MV2: Yeah.

MV: From Aunt Vagina (laughs).

MV2: I can't believe that you said it.

MV: Special thanks also to Sony macaroni, baloney and boney macaroni, every girls favorite love puppet.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-327

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 2440

Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan No. 9

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1990; Released: October 17, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed Transmittal No. 2440 on July 20, 1990. This transmittal introduces AT&T's ninth Competitive Pricing Plan (CPP9) under AT&T Tariff F.C.C. No. 15, scheduled to become effective on October 18, 1990. According to AT&T, CPP9 constitutes a competitive response to an offer made by MCI Telecommunications Inc. (MCI) for provision of telecommunications services to Schwan's Sales Enterprises, Inc. (Schwan). Petitions against this transmittal were filed by MCI, US Sprint Communications Company Limited Partnership (US Sprint), the Competitive Telecommunications Association (CompTel), and the National Telecommunications Network (NTN).[1] For the reasons discussed below, we suspend Transmittal 2440 for the full five-month statutory period.

II. BACKGROUND

2. AT&T contends that this transmittal represents AT&T's competitive response to an offer made by MCI to provide outbound, inbound, and international telecommunications services to Schwan at rates that are lower than MCI's tariffed offerings. According to AT&T, Schwan has expressed an intention to switch from AT&T to MCI unless AT&T counters that offer. AT&T Transmittal No. 2440, Description and Justification (D&J) at 2. With CPP9, AT&T proposes to discount Schwan's monthly bill for Software Defined Network (SDN) Service by 13 percent, and provide an 8 percent discount off AT&T's 800 Term Plan-Location and Service Specific for Megacom 800 Service, Basic 800 Service, 800 ReadyLine as well as a 7 percent discount off AT&T World Connect calls.[2] The term for CPP9 would be four years. AT&T Tariff F.C.C. No. 15, Transmittal No. 2440, Section 11.1, 2nd Revised Page 34.

III. PLEADINGS

A. Petitions

3. MCI argues that CPP9 effectively bundles AT&T's Megacom 800 service with other services to take advantage of AT&T's dominance in the 800 services market. MCI Petition at 3. MCI and NTN contend that this bundling practice has been proscribed by the Commission. *Id.*, citing AT&T Communications, Inc., 5 FCC Rcd 3833 (Com.Car.Bur. 1990); NTN Petition at 3. MCI also argues that the competitive necessity test does not justify AT&T's CPP9 offering because that test applies to services made available to classes of customers and not single customers. *Id.* at 3. MCI disputes AT&T's claim that CPP9 is not limited to Schwan and therefore is within the competitive necessity doctrine. MCI notes that AT&T's tariff specifies that in order to procure CPP9, a customer must have been actually offered a discount by MCI, yet, MCI contends that, in the same filing, AT&T also asserts that MCI's offer has only been made to Schwan and, that AT&T's offer has not been made to any other customer. MCI Petition at 4, citing AT&T D&J at 2, 7, 9, and Tariff 15, Section 2.1.5.A.3. These statements, according to MCI, effectively limit CPP9 to a single customer, Schwan, thereby placing this offer outside the scope of the competitive necessity test which requires that an offering be made generally available to classes of customers. MCI Petition at 4.

4. The three other petitioners also argue that CPP9 fails to satisfy the competitive necessity test. [3] NTN argues generally that AT&T's claims of competitive necessity are without merit in light of AT&T's market power. NTN Petition at 2. Comptel argues that CPP9 fails the first prong of the competitive necessity test because it offers Schwan discounts off certain services either "individually or in combination," whereas, MCI's offer apparently applies to only a combination of services. According to CompTel, CPP9 thus exceeds the bounds of MCI's offer and therefore does not meet the first prong of the test which requires that a carrier demonstrate that competitive alternatives are equal to or lower than the carrier's offer. CompTel Petition at 4.

5. US Sprint argues that CPP9 fails to meet all three prongs of the competitive necessity test. According to US Sprint, the plan fails to meet the first prong of the test because it is not clear whether AT&T's pricing meets or beats MCI's offering to Schwan. US Sprint Petition at 3-4. US Sprint further argues that CPP9 fails to meet the second prong of the competitive necessity test because it is unduly discriminatory to offer this service to a single customer. *Id.* at 5. US Sprint charges that AT&T's statement that this offering will be available to other customers who have received a substantially similar offer is vague and still discriminatory because it is unlikely that resellers would be allowed by AT&T to take advantage of CPP9. *Id.* at 5-6. The third prong of the competitive necessity test is also not met by AT&T, in US Sprint's view, because AT&T has not demonstrated that CPP9 will be profitable and not burden other ratepayers. *Id.* at 6.

6. Finally, US Sprint charges that CPP9 constitutes an attempt by AT&T to circumvent price cap regulation[4] by offering "nothing more than discounted SDN and 800 service" to Schwan. *Id.* at 6. US Sprint suggests that the Commisson did not anticipate or consider the consequences of the selective transformation of price capped services into Tariff 15 offerings. *Id.* at 7. US Sprint argues

that these transfers will increase the likelihood of cross-subsidization and will seriously compromise an intended benefit of price cap regulation which was to promote lower prices for all consumers. *Id.* at 8-9. The solution, argues US Sprint, is to prohibit Tariff 15 offerings. *Id.* at 9.

B. AT&T Reply

7. AT&T contends that its use of the competitive necessity test is justified and that no petitioner has refuted the factual basis upon which its use of the test is based. AT&T Reply at 2-3. AT&T disputes MCI's claim that CPP9 impermissibly bundles Megacom 800 and SDN by noting that the discount applies to procurement of services individually or in combination. *Id.* at 3. Furthermore, AT&T believes that "if MCI's offer is bundled, AT&T's response *a fortiori* 'meets but not beats' that offer, because the price the customer will pay with any service or combination of the services offered by AT&T will be higher than the price the customer would pay for the comparable service or services under MCI's proposal." *Id.* at 4.

8. AT&T contends that the substantive provisions of the Communications Act apply to all carriers and not merely to carriers classified as dominant. *Id.* at 5. AT&T therefore concludes that if single customer pricing is lawful for non-dominant carriers, then it is also lawful for AT&T. *Id.* at 6.

IV. DISCUSSION

9. We conclude, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the prohibition against unreasonable discrimination established by the Communications Act. Yet, as the Commission observed at the time it initiated its investigation of the first Tariff 15 offering, the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[5] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

10. We also conclude that the issues raised by this transmittal warrant exercise of our discretion to suspend the transmittal pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of service offerings. In deciding whether to suspend, we must balance the interests of ratepayers, the filing carrier, and the competitive process. On balance, we have decided that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal, and consequently the potential for harm to other ratepayers, outweighs any negative impact the suspension may have upon AT&T. Therefore, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

11. We will incorporate this investigation into the proceeding established in CC Docket No. 90-327. We will designate the issues to be examined in this investigation in a future Order.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal No. 2440.

13. IT IS FURTHER ORDERED that this investigation IS INCORPORATED into the proceeding established in CC Docket No. 90-327.

14. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by AT&T Communications ARE SUSPENDED until March 18, 1991.

15. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 90-1104 is assigned for this purpose.

16. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 2440 filed by MCI Telecommunications Corporation, National Telecommunications Network, and US Sprint Communications Company Limited Partnership ARE DENIED.

17. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 2440 filed by the Competitive Telecommunications Association IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Reject, filed Aug. 6, 1990 (MCI Petition); US Sprint Petition To Reject, filed Aug. 6, 1990 (US Sprint Petition); CompTel Petition To Reject or, in the Alternative, To Suspend and Investigate, filed Aug. 6, 1990 (CompTel Petition); and Petition To Reject of the National Telecommunications Network, filed Aug. 6, 1990 (NTN Petition). AT&T replied to these petitions on August 16, 1990 (AT&T Reply).

[2] On October 10, 1990, AT&T withdrew the second aspect of this transmittal which proposed a credit to be applied to the customer's bill if the service date of CPP9 occurred after October 18, 1990. In light of the withdrawal of this provision, we do not need to review questions raised by petitioners regarding its lawfulness.

[3] To justify a discriminatory rate on the grounds of competitive necessity, the carrier must show that:

> 1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering;

2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and

3) the volume discount contributes to reasonable rates and efficient services for all users.

Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984).

[4] *See* 47 C.F.R. §§ 61.41 through 61.49.

[5] AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7712, 7713 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 12, 1990

COMMON CARRIER BUREAU
AIR-TO-GROUND SERVICE IN THE 800 MHz BAND

On June 15, 1990, pursuant to the *Report and Order* in Gen. Docket No. 88-96, 5 FCC Rcd 3861 (1990), the Commission opened a filing window for the acceptance of applications for authority to construct 800 MHz air-to-ground communications facilities. The *Report and Order* allowed for the filing of applications until October 15, 1990. The Commission has decided to extend the filing window for an additional one week period. Accordingly, applications for air-to-ground service will be accepted until October 22, 1990.

For further information contact Jay Jackson, Telephone No. (202) 653-5560 or Joseph Weber, Telephone No. (202) 632-6450.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: October 17, 1990

COMMENTS INVITED ON LOUISIANA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Louisiana (Region 18).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 18 consists of the State of Louisiana. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 90-498, Louisiana Area - Region 18,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-477

In the Matter of

Amendment of Section 73.202(b), RM-7349
Table of Allotments,
FM Broadcast Stations.
(Mattoon and Neoga, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by The Cromwell Group of Illinois, Inc. (petitioner) seeking the substitution of Channel 267B1 for Channel 267A, a change of community of license from Mattoon, Illinois, to Neoga, Illinois, and modification of the construction permit for Station WMCI to specify operation on Channel 267B1 at Neoga.

2. Petitioner states that Neoga is incorporated with a 1980 population of 1,746 persons.[1] Petitioner also states that the upgrade of Station WMCI to Channel 267B1 and its simultaneous allotment to Neoga meets the Commission's separation and city grade coverage requirements. The upgrade would provide a first local aural service to Neoga and a substantial increase in total population served, and Mattoon, population 19,700, would not be deprived of its sole broadcast service.[2]

3. An engineering analysis has determined that Channel 267B1 can be reallotted to Neoga, Illinois, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 16 kilometers (9.9 miles) east of the city. [3] The site restriction is necessary in order to avoid a short-spacing to the licensed site of Station WMGI(FM), Channel 264B, Terre Haute, Indiana, and Station WBNQ(FM), Channel 268B, Bloomington, Indiana.

4. The public interest may be served by proposing to change the community of license from Mattoon to Neoga as the change could provide Neoga with a first local service, without depriving Mattoon of its sole local broadcast service. As requested, we shall also propose to modify petitioner's construction permit for Station WMCI(FM) to specify Channel 267B1. In accordance with Section 1.420(i), we will not accept competing expressions of interest in use of the channel at Neoga. *See, Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989).

5. In view of the fact that Neoga could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Mattoon, Illinois	245B, 267A	245B
Neoga, Illinois	—	267B1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 21, 1990,** and reply comments on or before **January 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John F. Garziglia
Howard J. Barr
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Attorneys for The Cromwell Group
of Illinois, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures taken from the 1980 U.S. Census.

[2] Stations WLBH(AM) and WLBH(FM) are currently licensed to Mattoon, Illinois.

[3] Petitioners proposed coordinates for Channel 267B1 at Neoga are North Latitude 39-17-19 and West Longitude 88-16-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-497

In the Matter of

Amendment of Section 73.202(b), RM-7420
Table of Allotments,
FM Broadcast Stations.
(Garapan, Saipan)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Commonwealth Radio Corp. ("petitioner"), the Commission considers herein a petition for rule making proposing the allotment of Channel 262C2 to Garapan, Saipan, as that community's fourth local FM service. Petitioner stated its intention to apply for the channel, if allotted.

2. An engineering analysis has determined that Channel 262C2 can be allotted to Garapan in compliance with the Commission's minimum distance separation requirements.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 262C2 to Garapan, Saipan, as that community's fourth local FM service. Accordingly, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Garapan, Saipan	230A, 250C2, 280C2	230A, 250C2, 262C2, 280C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 21, 1990,** and reply comments on or before **January 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robyn G. Nietert
Robert J. Rini
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(Attorneys for Commonwealth Radio Corp.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The proposed coordinates are North Latitude 15-11-10 and West Longitude 145-44-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-586

In the Matter of

Amendment of Section 73.202(b), RM-7034
Table of Allotments,
FM Broadcast Stations.
(Millen, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 1, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Radio Millen Broadcasting Co., Inc. ("Millen") the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8747 (1989), proposing the substitution of Channel 235C3 for Channel 235A at Millen, Georgia, and the modification of its construction permit (BPH-880161MD) to specify the higher class channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. Bay Communications, Inc. ("BCI"), permittee of Station WAAW(FM), Channel 234A, Williston, South Carolina, filed a motion for leave to file comments. Millen filed a motion for extension of time, and an opposition to BCI's motion for leave to file comments. BCI filed a request for extension of time to reply to opposition to motion for leave to file comments. BCI filed a reply to opposition to motion for leave to file comments.[1] Millen filed a motion for leave to file further comments and request for expedited action.[2]

2. Millen, in its further comments, proposes a change in its reference coordinates to North Latitude 32-43-10 and West Longitude 81-52-00, which meets all mileage separation requirements for C3 operation by Station WMKO. Millen states that the new reference site meets the spacing requirements to the construction permit of Station WAAW(FM), Channel 234A, Williston, South Carolina.

3. In view of the above information, we believe that the public interest would be served by substituting Channel 235C3 for Channel 235A at Millen, Georgia. Channel 235C3 can be substituted for Channel 235A at Millen in compliance with the Commission's minimum distance separation requirements with a site restriction of 12 kilometers (7.5 miles) southeast of the community. [3] As proposed, we shall modify the construction permit for Station WMKO(FM) to specify operation on Channel 235C3.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 14, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Millen, Georgia	235C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WMKO(FM), IS MODIFIED to specify operation on Channel 235C3 in lieu of Channel 235A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Here, BCI's comments were filed May 15, 1990, long after February 27, 1990, the last day for filing comments or replies in this proceeding. In support of its late comments, BCI notes that it filed an application on October 2, 1989, for a minor modification of its facilities to increase its power to 6 kW. However, the site specified in the *Notice of Proposed Rule Making* for Millen is short-spaced by 1.43 kilometers to BCI's modification application at Williston, South Carolina. The late filed pleadings have not been accepted for consideration herein, in accordance with Section 1.415(d) of the Commission's Rules.

[2] Since this pleading resolves the short-spacing issue between Station WMKO at Millen, Georgia, and Station WAAW, Williston, South Carolina, we have accepted the late filed pleading.

[3] The coordinates for Channel 235C3 at Millen are North Latitude 32-43-10 and West Longitude 81-52-00. Because this petition for rule making was filed prior to October 2, 1989, the petitioner may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-496

In the Matter of

Amendment of Section 73.202(b), RM-7381
Table of Allotments,
FM Broadcast Stations.
(Crawford, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Georgia Family Radio Limited Partnership (petitioner), permittee of Station WGMG(FM), Channel 271A, Crawford, Georgia, the Commission considers herein a petition for rule making proposing the substitution of Channel 271C3 for Channel 271A at Crawford, Georgia, and the modification of its construction permit (BMPH-891109IC) for Station WGMG(FM) to specify operation on Channel 271C3.

2. An engineering analysis has determined that Channel 271C3 can be allotted to Crawford in compliance with the Commission's minimum distance separation requirements with a site restriction 17 kilometers (10.5 miles) northeast[1] in order to avoid a short-spacing to a construction permit for Station WGGA, Channel 270A at Cleveland, Georgia, and a vacant allotment for Channel 271A at Bolingbroke, Georgia.

3. As requested, we shall propose to modify the construction permit for Station WGMG(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 271C3 at Crawford, nor require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the fact that Crawford could receive an expanded wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Crawford, Georgia	271A	271C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 21, 1990,** and reply comments on or before **January 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 33-57-10 and West Longitude 82-59-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-495

In the Matter of

Amendment of Section 73.202(b), RM-7405
Table of Allotments,
FM Broadcast Stations.
(Saugerties, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Peter Moncure (petitioner) requesting the allotment of Channel 225A to Saugerties, New York, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 225A can be allotted to Saugerties in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) south of the community to avoid short-spacings to Stations WFLY, Channel 222B, Troy, New York, WRVW, Channel 228A, Hudson, New York, and WHYN-FM, Channel 226B, Springfield, Massachusetts.[1] Canadian concurrence in the allotment is required because Saugerties is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 225A to Saugerties, New York, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Saugerties, New York	--	225A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 21, 1990,** and reply comments on or before **January 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Moncure
1111 Fawn Road
Saugerties, New York 12477
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 225A at Saugerties are North Latitude 42-01-00 and West Longitude 73-59-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-494

In the Matter of

Amendment of Section 73.202(b), RM-7473
Table of Allotments,
FM Broadcast Stations.
(Cottage Grove, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Paul C. Bjornstad ("petitioner") requesting the allotment of Channel 273A to Cottage Grove, Oregon, as the community's first local FM service.[1] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 273A to Cottage Grove, Oregon, since it could provide the community with its first local FM service. Channel 273A can be allotted to Cottage Grove in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.3 kilometers (3.3 miles) south of the community to avoid a short-spacing to unoccupied but applied-for Channel 272A at Brownsville, Oregon.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cottage Grove, Oregon	--	273A, 288C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 21, 1990,** and reply comments on or before **January 7, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret L. Tobey, Esq.
Mark D. Schneider, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Commission also has pending a proposal to allot Channel 288C1 to Cottage Grove, Oregon, in MM Docket 89-591. *See* 5 FCC Rcd 8 (1990). If Channel 288C1 is allotted to Cottage Grove, Channel 273A would become the community's second local FM service.

[2] The coordinates for Channel 273A at Cottage Grove are North Latitude 43-45-04 and West Longitude 123-03-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-186

In the Matter of

Amendment of Section 73.202(b),	RM-7105
Table of Allotments,	
FM Broadcast Stations.	
(Merced, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: October 30, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 2145 (1990), issued in response to a petition filed by Eric R. Hilding (petitioner), proposing the allotment of Channel 231A to Merced, California, as that community's fifth local FM broadcast service. Petitioner and Miklos Benedek each filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 231A to Merced, since it could provide an additional local FM broadcast service to the community.

3. As indicated in the *Notice*, Channel 231A can be allotted to Merced consistent with the minimum distance separation requirements of the Commission's Rules, provided the transmitter is located at least 6.9 kilometers (4.7 miles) southeast of the community[1] to avoid a short-spacing to Channel 230A, Modesto, California,[2] for which applications are pending. [3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 14, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Merced, California	231A, 248B, 268B, 292A, 299A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 231A at Merced, California, will open on **December 17, 1990,** and close on **January 16, 1991.** [4]

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates used for Channel 231A at Merced are 37-16-20 and 120-24-45.

[2] Coordinates for Channel 230A at Modesto, California, are 37-38-36 and 121-00-06.

[3] The site restriction placed on proposed Channel 231A at Merced also meets the minimum distance separation requirements to each of nine applications accepted for filing for Channel 230A at Modesto, CA.

[4] Because the petition for rule making in this proceeding was filed prior to October 2, 1989, applicants for Channel 231A at Merced may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 30, 1990

GTE CORPORATION SEEKS FCC CONSENT TO ACQUIRE CONTEL CORPORATION PLEADING CYCLE ESTABLISHED

GTE Corporation (GTE) and Contel Corporation (Contel) have filed applications under Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d), requesting Commission approval for the transfer of control to GTE of those licenses and authorizations controlled or requested by Contel or its subsidiaries. This transfer of control will take place as a result of the proposed merger of the two companies. After the proposed merger, GTE will be the parent corporation, and Contel will become a wholly owned subsidiary of GTE. The applications include requests for authority to transfer control of various licenses and authorizations. File No. ENF-90-11 has been assigned to the applications for purposes of reference and coordination, even though separate file numbers have been assigned to the various individual applications for consent to transfer control of the licenses and authorizations in the different services noted below. GTE and Contel are requesting Commission approval for the transfer of control from Contel to GTE of all licenses or authorizations controlled or requested by Contel or its subsidiaries. With the exception of the Private Radio Services authorizations noted below, all of the following authorizations are issued by the Common Carrier Bureau.

SECTION 214 APPLICATIONS

DOMESTIC FACILITIES

File No. W-P-C-6640. Application for consent to transfer control from Contel to GTE of domestic Section 214 authorizations held or requested by Contel of Arkansas, Inc.; Contel of California, Inc.; Contel of Illinois, Inc.; Contel of Indiana, Inc.; Contel of Iowa, Inc.; Contel of Missouri, Inc.; Contel of New York, Inc.; Contel of Pennsylvania, Inc.; Contel of Texas, Inc.; Contel of Virginia, Inc.; and Contel of the West, Inc.

INTERNATIONAL FACILITIES

File No. I-T-C-90-195-(TC). Application for consent to transfer control from Contel to GTE of international Section 214 authorizations held or requested by American Satellite Company, Contel Federal Systems, Inc., and Equatorial Communications Company. The following file numbers are assigned to specific applications:

American Satellite Company	ITC-90-184
	ITC-90-185
	ITC-81-051
	ITC-85-066
	ITC-85-187
	ITC-85-188
	ITC-89-018
Equatorial Communications Company	ITC-83-199
	ITC-83-199-A
	ITC-83-014
	ITC-83-092
	ITC-85-014
Contel Federal Systems	ITC-90-181
	ITC-90-182
	ITC-90-183
	ITC-83-036
	ITC-84-197
	ITC-85-189

SECTION 310 APPLICATIONS

PUBLIC CELLULAR RADIO SERVICES

Applications for consent to transfer control from Contel to GTE of the cellular radio services authorizations controlled or requested by Contel or its subsidiaries. The file number noted below has been assigned to the lead application of the ninty-eight applications filed by Contel subsidiaries in this service.

Alabama RSA 1 Partnership (File No. 06850-CL-TC-1-90, et al.)
Arizona RSA 3 South Limited Partnership
Binghamton MSA Limited Partnership
Birmingham Cellular Telephone Company
California RSA No. 3 Limited Partnership
California RSA No. 4 Limited Partnership
Central Kentucky Cellular Telephone Company
Central Kentucky Cellular Telephone Company
Chattanooga Cellular Telephone Company
Coconino, Arizona RSA Limited Partnership
Contel Cellular Inc.
Contel Cellular Inc.
Contel Cellular of California, Inc.
Contel Cellular of California, Inc.
Contel Cellular of California, Inc.
Contel Cellular of California, Inc.
Contel of Davenport, Inc.
Contel Cellular of New York, Inc.
Contel Cellular of Norfolk, Inc.
Contel Cellular of Norfolk, Inc.
Contel Cellular of Richmond, Inc.
Contel Cellular of Richmond, Inc.
Contel Cellular of South Dakota, Inc.
Contel Cellular of the Southwest, Inc.
Contel Cellular of the Southwest, Inc.
Contel Cellular of Vermont, Inc.

Contel of Kentucky, Inc.
Contel of Kentucky, Inc.
Contel of Missouri, Inc.
Cumberland Cellular Telephone Company
Custer RSA Limited Partnership
Dannon Communications, Inc.
Evansville MSA Limited Partnership
Evansville MSA Limited Partnership
Fayetteville MSA Limited Partnership
Florence Cellular Telephone Company
Fort Smith MSA Limited Partnership
Fresno MSA Limited Partnership
Fresno MSA Limited Partnership
Fresno MSA Limited Partnership
Fresno MSA Limited Partnership
Gadsden CellTelCo
Georgia RSA #3 Limited Partnership
Idaho RSA 3 Limited Partnership
Idaho RSA No. 5 Limited Partnership
Illinois Independent RSA No. 3 Partnership
Illinois RSA 1 Limited Partnership
Illinois Valley Cellular RSA 2-I Partnership
Iowa RSA No. 4 Limited Partnership
Iowa RSA 5 Limited Partnership
Jackson RSA Limited Partnership
Kentucky RSA No. 1 Partnership
Knoxville Cellular Telephone Company
Manchester NECMA Limited Partnership
Memphis Cellular Telephone Company
Minnesota RSA No. 4 General Partnership
Missouri RSA 2 Partnership
Missouri RSA 4 Partnership
Mobile MSA Limited Partnership
Nashville Cellular Telephone Company
Nevada RSA 3 Partnership
New Hampshire RSA 2 Partnership
New Mexico RSA 3 Limited Partnership
New Mexico RSA No. 5 Limited Partnership
New Mexico RSA 6 Partnership
New York RSA 2 General Partnership
New York RSA No. 3 Cellular Partnership
New York RSA No. 4 Partnership
Norfolk-Virginia Beach-Portsmouth MSA Limited Partnership
Norfolk-Virginia Beach-Portsmouth MSA Limited Partnership
Norfolk-Virginia Beach-Portsmouth MSA Limited Partnership
Norfolk-Virginia Beach-Portsmouth MSA Limited Partnership
North Carolina RSA 1 Partnership
Northeastern Georgia RSA Limited Partnership
Northwest Arkansas RSA Limited Partnership
Northwest Arkansas RSA Limited Partnership
Oklahoma RSA No. 4 Partnership
Oregon RSA 5 Limited Partnership
Pensacola MSA Limited Partnership
Roanoke MSA Limited Partnership
Rockford MSA Limited Partnership
Southern Illinois RSA Partnership
Southern Illinois RSA Partnership
Southern Indiana RSA Limited Partnership
Southern Indiana RSA Limited Partnership
Southern Indiana RSA Limited Partnership
Southwest Texas Limited Partnership
Southwest Texas Limited Partnership
Southwest Texas Limited Partnership
Texas RSA 10B3 Limited Partnership
Tri-Cities Cellular Telephone Company
Tuscaloosa Cellular Partnership
Utah RSA 6 Limited Partnership
Vermont RSA Partnership
Vermont RSA Partnership
Virginia RSA 5 Limited Partnership
Washington RSA 2 Limited Partnership
Yuma, Arizona RSA Limited Partnership

DOMESTIC PUBLIC FIXED RADIO SERVICES

File Nos. 13001-CP-TC-91 through 13035-CP-TC-91. Applications for consent to transfer control from Contel to GTE of point-to-point microwave radio authorizations and local television transmission service authorizations controlled or requested by the following Contel subsidiaries. The individual file numbers noted below have been assigned to the named licensees.

CONTEL CELLULAR SUBSIDIARIES
Contel Cellular Inc. (File No. 13001)
Contel Cellular Holding, Inc. (File No. 13002)
Contel Cellular of Arkansas, Inc. (File No. 13003)
Contel Cellular of California, Inc. (File No. 13004)
Contel Cellular of Davenport, Inc. (File No. 13005)
Contel Cellular of Illinois, Inc. (File No. 13006)
Contel Cellular of Indiana, Inc. (File No. 13007)
Contel Cellular of Mobile, Inc. (File No. 13008)
Contel Cellular of New Hampshire, Inc. (File No. 13009)
Contel Cellular of New York, Inc. (File No. 13010)
Contel Cellular of Norfolk, Inc. (File No. 13011)
Contel Cellular of Richmond, Inc. (File No. 13012)
Contel Cellular of South Dakota, Inc. (File No. 13013)
Contel Cellular of the Southwest, Inc. (File No. 13014)
Contel Cellular of Vermont, Inc. (File No. 13015)
Illinois Valley Cellular RSA 2-I Limited Partnership (File No. 13016)
New Mexico 6 Limited Partnership (File No. 13017)
Norfolk-Virginia Beach-Portsmouth MSA Limited Partnership (File No. 13018)

CONTEL SATELLITE SUBSIDIARIES
American Satellite Company (File No. 13019)
Contel Federal Systems, Inc. (File No. 13020)

CONTEL TELEPHONE SUBSIDIARIES
Contel of Arkansas, Inc. (File No. 13021)
Contel of California, Inc. (File No. 13022)
Contel of Illinois, Inc. (File No. 13023)
Contel of Kansas, Inc. (File No. 13024)
Contel of Kentucky, Inc. (File No. 13025)
Contel of Maine, Inc. (File No. 13026)
Contel of Minnesota, Inc. (File No. 13027)
Contel of Missouri, Inc. (File No. 13028)
Contel of New York, Inc. (File No. 13029)
Contel of North Carolina, Inc. (File No. 13030)
Contel of Texas, Inc. (File No. 13031)
Contel of Virginia, Inc. (File No. 13032)
Contel of West Virginia, Inc. (File No. 13033)
Contel of the South, Inc. (File No. 13034)
Contel of the West, Inc. (File No. 13035)

DOMESTIC FIXED-SATELLITE SERVICES

Application for consent to transfer control of earth station licenses held by American Satellite Company (File No. 2224-DSE-TC-90(123)); amendment of pending earth station applications filed by American Satellite Company to reflect transfer of control (File No. 2225-AMEND-TC-90(1)); application for consent to transfer control of space station licenses held by American Satellite Company (File No. 69-DSS-TC-90(5)).

Application for consent to transfer control of earth station licenses held by Contel Federal Systems (File No. 2226-DSE-TC-90(132)); amendment of pending earth station applications filed by Contel Federal Systems to reflect transfer of control (File No. 2227-DSE-AMEND-90(2)).

Application for consent to transfer control of earth station licenses held by Equatorial Communications Company (File No. 2228-DSE-TC-90(3886)); amendment of pending earth station applications filed by Equatorial Communications Corporation to reflect transfer of control (File No. 2229-DSE-AMEND-90(567)).

INTERNATIONAL FIXED SATELLITE SERVICES

File No. CSG-90-131-(TC). Application for consent to transfer control from Contel to GTE of the international satellite earth station authorizations held or requested by American Satellite Company, Contel Federal Systems, Inc., and Equatorial Communications Company. The following file numbers have been assigned to applications filed by Contel subsidiaries.

LICENSEE	FILE NO.	CALL SIGN
American Satellite Company	CSG-90-004-ML	(E860593)
	CSG-86-074-P/L	(KA96)
	1859-DSE-MP/L-88	(KA214)
	CSG-89-063-ML	(KB25-A)
	CSG-87-057-P/L	
	CSG-88-022-P/L	
	CSG-87-032-P/L	
	CSG-90-091-ML	
	CSG-90-095-ML	(TAO-1685)
	CSG-90-109-ML through	
	CSG-90-112-ML	
	CSG-90-117-ML through	
	CSG-90-130-ML	
Equatorial Communications Company	CSG-89-128-P/L	
	CSG-90-115-ML	(E4625)
	CSG-90-116-ML	(E8715)
	CSG-91-002-ML	(E890130)
Contel Federal Systems, Inc.	103-DSE-MP/L-85	(E4373)
	CSG-83-022-P/L	(KA44)
	CSG-83-023-P/L	(KA43)
	CSG-90-082-ML	
	CSG-90-098-ML	
	CSG-90-113-ML	(E9334)
	CSG-90-114-ML	
	1478/1479-SSA-90	(WY44/WY45)
		(TAO-1646)

DOMESTIC PUBLIC LAND MOBILE RADIO SERVICES

Applications for consent to transfer control from Contel to GTE of the DPLMRS authorizations controlled or requested by Contel subsidiaries. The file number noted below has been assigned to the lead application of the eighteen applications filed by Contel subsidiaries in these services.

Contel of Arkansas, Inc. (File No. 28317-CD-TC-1-90, et al.)
Contel of California, Inc.
Contel of Illinois, Inc.
Contel of Indiana, Inc.
Contel of Iowa, Inc.
Contel of Kansas, Inc.
Contel of Kentucky, Inc.
Contel of Minnesota, Inc.
Contel of Missouri, Inc.
Contel of New Hampshire, Inc.
Contel of New York, Inc.
Contel of Texas, Inc.
Contel of Vermont, Inc.
Contel of the Northwest, Inc.
Contel of the South, Inc.
Contel of the West, Inc.
Contel System of Missouri, Inc.
Contel Cellular Inc.

RURAL RADIO SERVICES

Applications for consent to transfer control from Contel to GTE of the rural radio services authorizations controlled or requested by various Contel subsidiaries. The file number noted below has been assigned to the lead application of the seven applications filed by Contel subsidiaries in these services.

Contel of California, Inc. (File No. 60141-CR-TC-1-90, et al.)

Contel of Minnesota, Inc.

Contel of New York, Inc.

Contel of Texas, Inc.

Contel of West Virginia, Inc.

Contel of the Northwest, Inc.

Contel of the West, Inc.

PRIVATE RADIO SERVICES

File No. 902059. Application for consent to transfer control from Contel to GTE of private operational fixed microwave licenses held by Equatorial Communications Company.

INTERLOCKING DIRECTORATES

GTE and Contel also are requesting a declaration under Section 212 of the Communications Act, 47 U.S.C. § 212 that, upon consummation of the proposed merger, they will be "commonly owned carriers" within the meaning of Section 62.2 of the Commission's Rules, 47 CFR § 62.2. That request has been assigned file number EID-672.

REQUEST FOR EXEMPTION

GTE and Contel have requested an exemption from the "cut-off" requirements which affect Part 22 applications with major amendments. Section 22.23(g)(3); 47 CFR § 22.23(g)(3). states that a change of ownership will be a major amendment to an application unless it "reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the cut-off requirements of § 22.31 is granted."

GENERAL INFORMATION

The transfer of control requests listed herein have been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return the applications if, upon further examination, they are determined to be defective and not in conformance with the Commission's Rules or policies.

Parties wishing to comment on this matter may do so no later than **December 3, 1990.** Reply comments should be filed no later than **December 18, 1990.** All filings concerning any or all of the matters referenced in this Public Notice should contain references to File No. ENF-90-11 as well as references to specific file numbers for the individual applications or other matters to which the filings pertain.

Copies of the application and any subsequently filed documents in this matter may be obtained from International Transcription Services, Inc., 2100 "M" Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. The application and documents are also available for inspection and copying in Room 6206, 2025 "M" Street, N.W., Washington, D.C. 20554.

For further information contact Adrien Auger or Thomas David at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

ROGER LEE
AND LANI LEE,
Complainants,

v. File No. E-88-65

THE WESTERN UNION
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted October 22, 1990; Released: October 30, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. The above-captioned complaint was filed in accordance with an order of referral to the Federal Communications Commission issued by a district court judge in a consolidated class action complaint. *See In Re: Long-Distance Telecommunications Litigation*, MDL Docket No. 598 (E.D. Mich. April 1, 1987), and *Roger & Lani Lee v. Western Union Telegraph Co. and Western Union Corporation*, No. 84 C 7912 (N.D. Cal.). On October 9, 1990, counsel for the parties jointly moved for the dismissal of this proceeding. They state that a settlement agreement between the parties in the Federal Court action from which this matter was referred was approved by the court and a final judgment was entered dismissing that case. *Roger & Lani Lee v. Western Union Telegraph Co. and Western Union Corporation* (Aug. 31, 1990).

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-190

In re Applications of

KILL DEVIL HILLS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-880406MF
OCEANSIDE COMMUNICATIONS, INC.	File No. BPH-880407MP
FIRST FLIGHT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880407MR
EDWARD FENTON LAWLER	File No. BPH-880407MS
KDH BROADCASTING, LIMITED PARTNERSHIP	File No. BPH-880407MT

For Construction Permit for New
FM Station, Channel 281C1,
Kill Devil Hills, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1990; Released: October 31, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On August 24, 1990, First Flight Broadcasting Limited Partnership (First Flight) filed an appeal from Administrative Law Judge (ALJ) Richard L. Sippel's *Memorandum Opinion and Order*, FCC 90M-2494, released August 13, 1990, which directed First Flight to amend its application to reflect the withdrawal of Robert L. Haskins as a limited partner, warning that should it fail to do so, it "will receive no comparative consideration in this case" and "will not be allowed to introduce any evidence in support of its application at the hearing scheduled to commence on March 5, 1991 . . . ." (capital letters deleted). The ALJ's ruling was designed to prevent a potential conflict of interest arising because counsel for Kill Devil Hills Communications Limited Partnership (KDHC), another applicant in the case, serves as counsel for nine other applicants in which Haskins has a limited partnership interest. First Flight contends in its appeal, however, that the ALJ's intervention was premature, since there is only a potential conflict, but argues that in any event the appropriate remedy – should an actual conflict arise – is withdrawal or disqualification of KDHC counsel. While the Board shares the ALJ's concern about counsel's potential conflict of interests, *see Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5161- 5162 (Rev. Bd. 1990), we will grant the appeal for the reasons set forth below.

BACKGROUND

2. On June 22, 1990, shortly after the applications were designated for hearing (within 30 days of the publication of the *Hearing Designation Order)*, First Flight amended its application pursuant to the reporting requirements of 47 CFR §1.65 to reflect the addition of Haskins as a limited partner to its application with a 45% equity interest, as well as the corresponding diminution of ownership percentages among the other limited partners. KDHC objected only in the event the conflict question could not be resolved, and the ALJ accepted the amendment for reporting purposes, but scheduled the matter for a more comprehensive discussion in the prehearing conference that had already been set for August 9, 1990. *Order*, FCC 90M-1993, released July 10, 1990. The *Order* further directed counsel for KDHC to submit, in advance of the conference, a memorandum outlining specific options acceptable to KDHC, Haskins, and First Flight, including appropriate forms of waiver. *Id.*

3. Counsel indicated in his memorandum there was "little likelihood that Mr. Haskin's participation as a limited partner would have any bearing on the outcome of the [hearing] . . . since Haskins only recently joined First Flight's partnership" and "would not have participated in pre- or post-formation activities which would call into question the *bona fides* of First Flight's structure," the "primary issue as to which Mr. Haskin's presence as a partner would be relevant." KDHC Memorandum filed August 7, 1990, at 5-6. Counsel further declared that he "was unaware of any information that he had received [personally] in the course of his representation of the other applications in which Haskins is a limited partner which could be relevant to [this] proceeding," but submitted that he was "prepared to screen himself from any involvement in the development of the evidentiary record regarding Mr. Haskins's participation in First Flight." He proposed to utilize another firm attorney – with no prior involvement in any of the cases in which Haskins is a limited partner – to undertake discovery and cross-examination of Haskins, or forego discovery and cross-examination. *Id*, at 6. Counsel also indicated that he and his firm would withdraw if it appears that Haskins's participation becomes a substantive issue. Tr. 27.

4. Following the prehearing conference, the ALJ, *sua sponte*, revisited his earlier ruling, rejecting the amendment for lack of good cause (*i.e.*, amendment was voluntary and would cause disruption). *MO&O*, *supra*, FCC 90M-2494. He also ordered First Flight to remove Haskins from the partnership in lieu of forfeiting its comparative case, and prohibited all parties from deposing or cross-examining Haskins. *Id.* This appeal followed.

DISCUSSION

5. First Flight's amendment reporting the transfer of a 45% limited partnership interest eight months before the evidentiary hearing is not objectionable under controlling Commission precedent. *See generally Anax Broadcasting Inc.*, 87 FCC 2d 483, 487-489 (1981) (approving post-designation amendment reporting the transfer of a substantial (71%) limited partnership interest.) Indeed, KDH Broadcasting, Limited Partnership (KDH) does not even identify in its application its 66.66% limited partners, nor was it required to do so under the form in use at that time. The substantive issue presented by this appeal is the potential conflict of interest; and on that matter, the relevant inquiry is whether the ALJ's intervention was warranted at this point of the proceeding; and if justified -- now or in the future -- what, if any, course of action is proper.

6. Our action here is controlled by *Scioto Broadcasters*, *supra*, 5 FCC Rcd 5161-5162 and n. 4. There, like here, counsel for one of the applicants simultaneously represented a competing applicant in matters unrelated to the proceeding. In rejecting claims for counsel's disqualification, we indicated that:

> [b]oth the Board and the Commission are reluctant to resolve claims of attorney misconduct in advance of review by relevant bar officials charged with maintaining ethical standards, *see, e.g., Opal Chadwell*, 2 FCC Rcd 3458 (1987), and will intervene only where, for example, a conflict is so clear that an untainted record would be all but impossible to achieve, thus requiring a hearing *de novo*, *see Dorothy J. Owens*, 104 FCC 2d 848 (Rev.Bd. 1986), *review denied*, 2 FCC Rcd 38 (1987), petition for judicial review dismissed on other grounds *sub nom, Law Office of Seymour M. Chase, P. C. v. FCC*, 843 F.2d 517 (D.C. Cir. 1988) (table), or where the conduct of an attorney is so opprobrious or disruptive that immediate action must be taken to preserve the integrity of FCC processes. *See, Benedict P. Cottone*, 39 RR 2d 1661, *recon. denied*, 41 RR 2d 241 (1977); *cf. Thomas Root*, FCC 90-240, released June 28, 1990.

5 FCC Rcd 5162. The Board held that "the essence of the law's demand" in such situations is "informed consent," quoting with approval counsel's brief that:

> [t]he decisions uniformly indicate that, whether the representation in question entails litigation or other matters, it is permissible, if (1) the clients involved have given their informed consent; and (2) adequate representation can be provided . . . .
>
> D.C. Bar Ethics Opinion No. 49; *accord, e.g.*, D.C. Bar Ethics Opinion Nos. 54, 68, 92, 106, 131, 136, 140, 163 & 165; *see e.g., City Consumer Services, Inc. v. Horne*, 571 F.Supp. 964, 970-971 (C.D. Utah 1983) (citing *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981); *see also Duca v. Ramark Industries*, 663 F.Supp. 184, 190 (E.D. Pa. 1986); *Clay v. Doherty*, 608 F.Supp. 295, 302-03 (N.D. 111, 1985). Indeed, many of the D.C. Bar Ethics Opinions which interpret DR 5-105(C) of the Code expressly *approve* instances of simultaneous representation *in the context of litigation*. *E.g.*, D.C. Bar Ethics Opinion Nos. 54, 92, 136, 140, 163 & 165; *cf.* D.C. Bar Ethics Opinion No. 106; *see also, e.g., City Consumer Services, Inc. v. Horne*, *supra* ; *Clay v. Doherty*, *supra*.

5 FCC Rcd at 5164, n. 3. We further observed (*id.*, citing to Rule 1.7(c)) that:

> [t]he new *Rules of Professional Conduct of the District of Columbia Bar* (which take effect on January 1, 1991), continue to trend toward "informed consent" in potential conflict situations. Thus, under Rule 1.7 unless there is a conflict in the "same matter," a "lawyer may represent a client . . . .if:
>
> "(1) Each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and,
>
> (2) The lawyer is able to comply with all other applicable rules with respect to such representation."

7. On the present record, there appears to be no absolute conflict requiring withdrawal, because KDHC, First Flight, and Haskins each has expressly consented to the dual representation by KDHC counsel, after full disclosure of the pertinent facts. They contend that adequate representation is possible in light of no actual conflict. Thus, we agree with First Flight that the ALJ's remedial directives are premature. Should an irreconcilable conflict develop between counsel's role as counsel of record for KDHC and his role as counsel to the outside applicants, it is the attorney with the conflict, not the client, who must withdraw. *See* DR 5-105(B) of the Code of Professional Responsibility; *see also Dorothy J. Owens, supra* (attorney disqualified after refusing to withdraw when actual conflict arose). DR Rule 5-105(B) (footnote omitted) provides:

> A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 5-105(C) provides:

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

8. That the instant potential conflict arose because of First Flight's minor amendment after the case had been designated for hearing is not legally significant for purposes of resolving a conflict of interest; and, in fact, removal of Haskins could not moot the conflict (assuming counsel remained in the case) if it later appears, for

example, that Haskins is an undisclosed real party to the applicant. That is, all of the parties, including KDHC, would be entitled "to inquire fully to the extent of Mr. Haskins's participation in First Flight to show that, because of Mr. Haskins's involvement, First Flight's limited partnership structure should be disregarded." First Flight Br. at 7. Moreover, First Flight's competitors have cited no authority for a contention that First Flight should be disqualified because of the possible conflict. And, any abuses caused by other applicants manufacturing conflicts for purposes of forcing out opposing counsel may be addressed by an abuse of process inquiry. The ALJ, of course, is vested with broad authority to regulate the course of the hearing, *see Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986) (subsequent story omitted), and he has "an overriding responsibility to develop an 'untainted' record in order to maintain the trust of the public in the integrity of the Commission's processes," *Independent Music Broadcasters, Inc.*, 68 FCC 2d 1412, 1417 (1978), but the primary responsibility for avoiding conflict lies with counsel, *see Miller Broadcasting, Inc.*, 98 FCC 2d 725, 729 (Rev. Bd. 1984). "We expect counsel to withdraw forthwith if even a hint of actual conflict with the client ensues." *Id.*

9. Finally, Canon 7 of the Code of Professional Responsibility states that "a lawyer should represent a client zealously within the bounds of the law." On the facts in *Scioto Broadcasters*, 5 FCC Rcd at 5164, n. 4, we did not reach the question whether counsel's attitude of not attacking competing applicant implicated the obligation of Canon 7. Here also, we do remind parties that EC 7-23 (Ethical Consideration) of the Code states that the adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Thus, any waiver by KDHC that would result in its "pulling its punches" against First Flight would be impermissible should that applicant, for example, conclude there is a basis for attacking First Flight as a sham based on Haskins's participation.

10. ACCORDINGLY, IT IS ORDERED, That the Appeal filed August 24, 1990 by First Flight Broadcasting Limited Partnership IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RELIGIOUS BROADCASTING NETWORK	**MM Docket No. 83-911** File No. BPCT-830505KV
A&R BROADCASTING COMPANY, A Limited Partnership	**MM Docket No. 83-914** File No. BPCT-830506KM
H. Frank Dominquez et al., d/b/a BUENAVISION BROADCASTERS	**MM Docket No. 83-915** File No. BPCT-830506KN
Sandra S. Phillips and the ARW Company d/b/a SSP BROADCASTING, A Limited Partnership)	**MM Docket No. 83-916** File No. BPCT-830506KO
GOOD NEWS BROADCASTING NETWORK	**MM Docket No. 83-919** File No. BPCT-830506KR
SANDINO TELECASTERS	**MM Docket No. 83-921** File No. BPCT-830506KT
INLAND EMPIRE TELEVISION	**MM Docket No. 83-922** File No. BPCT-830506KU
TELEVISION 30, INC.	**MM Docket No. 83-923** File No. BPCT-830506KV
SAN BERNARDINO BROADCASTING LIMITED PARTNERSHIP	**MM Docket No. 83-925** File No. BPCT-830506KX
ALL NATIONS CHRISTIAN BROADCASTING, INC.	**MM Docket No. 83-928** File No. BPCT-830506LA
CHANNEL 30, INC.	**MM Docket No. 83-930** File No. BPCT-830506LS

For Construction Permit
for New TV Station, Channel 30,
San Bernardino, California

MEMORANDUM OPINION AND ORDER

Adopted: October 18, 1990; Released: October 31, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is the *Supplemental Initial Decision*, 5 FCC Rcd 5331 (1990) (S.I.D.) of Administrative Law Judge Joseph P. Gonzalez (ALJ) and ten separate Joint Requests for Approval of Settlement Agreements filed by all remaining parties to this proceeding on September 20, 1990 (and Supplements filed September 28, 1990).

2. Rather than pursue this matter, the parties have elected not to file exceptions to the S.I.D. with the Board; instead, they propose to settle this proceeding with Sandino Telecasters (Sandino) paying each of the remaining applicants certain sums in exchange for the dismissal of each of their applications. More specifically, Sandino proposes to pay Religious Broadcasting Network, $800,000; A&R Broadcasting Company, $450,000; Buenavision Broadcasters, $275,000; SSP Broadcasting, $325,000; Good News Broadcasting Network, $560,000; Inland Empire Television, $500,000; Television 30, Inc., $250,000; San Bernardino Broadcasting, $850,000; All Nations Christian Broadcasting, Inc., $300,000; and (via stock purchase agreement), Channel 30, Inc., $2,650,000 (for a total consideration to all parties of $6,960,000).

3. Sandino is fully qualified to construct and operate as proposed. Further, pursuant to Section 73.3525 of the Commission's Rules, 47 CFR §73.3525 (which implements 47 U.S.C. §311(c), as amended), the parties have each submitted their proposed settlement agreements, accompanied by the required declarations indicating that their respective applications were filed in good faith and not for the purposes of reaching or carrying out a settlement agreement. The parties indicate that the proposed settlement agreements will be in the public interest, and that this action will conserve the resources of the Commission and will expedite initiation of new television broadcast service at San Bernardino, California. In light of the foregoing, and in the absence of any basic qualifying issues extant against the prevailing applicant, we find no impediment to the amicable settlement of this proceeding. Further, the Commission's Mass Media Bureau supports this resolution of the proceeding.

4. ACCORDINGLY, IT IS ORDERED, That the ten Joint Requests for Approval of Settlement Agreements filed by the captioned parties ARE GRANTED, and the attached settlement agreements ARE APPROVED; and,

5. IT IS FURTHER ORDERED, That the applications of Religious Broadcasting Network (File No. BPCT-83505KV); A&R Broadcasting Company (File No. BPCT-830506KM); Buenavision Broadcasters (File No. BPCT-830506KN); SSP Broadcasting (File No. BPCT-830506KO); Good News Broadcasting Network (File No. BPCT-830506KR); Inland Empire Television (File No. BPCT-830506KU); Television 30, Inc. (File No. BPCT-830506KV); San Bernardino Broadcasting Limited Partnership (File No. BPCT-830506KX); All Nations Christian Broadcasting, Inc. (File No. BPCT-830506LA); and Channel 30, Inc. (File No. BPCT-830506LS), ARE DISMISSED with prejudice, and the application of Sandino

Telecasters (File No. BPCT-830506KT) for a new UHF television facility at San Bernardino, California, IS GRANTED; and,

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-407

In re Applications of

RICHARDSON BROADCASTING GROUP	File No. BPH-870824MG
ELIZABETH M. YOUNTS	File No. BPH-870824MH
GREENE BROADCASTING, INC.	File No. BPH-870824MI

For Construction Permit for a
New FM Station, Channel 273A
Southern Pines, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1990; Released: October 31, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it the "Petition for Reconsideration" of our *Decision*, 5 FCC Rcd 5285 (Rev. Bd. 1990), filed by Richardson Broadcasting Group (RBG), on September 24, 1990, and pleadings responsive thereto. [1] We will deny the RBG petition.

2. Petitioner contends that "[t]he Review Board . . . reduced the credit due RBG because RBG's General Partner 'has not resided in Southern Pines since 1978.'" [2] Observing that its General Partner has lived in nearby Aberdeen since 1978, and citing (*inter alia*) *Ronald Sorenson*, 5 FCC Rcd 3144, 3149 n.10 (Rev. Bd. 1990), RBG contends that (to the extent that Younts is due any local residence credit at all) RBG must be awarded equal (if not greater) local residence credit.

3. But the line of cases cited by RBG applies only when the community of license is essentially "inseparable" from the residential community, [3] and RBG has not shown that Aberdeen and Southern Pines are not separate and distinct communities. The Board did not disturb or "reduce" RBG's "service area" residence (assuming, *arguendo*, that it was basically qualified *see supra* note 1), but followed *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). No reappraisal is warranted.

4. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed October 2, 1990 by Richardson Broadcasting Group IS GRANTED, and the amendment IS ACCEPTED; and

5. IT IS FURTHER ORDERED, That the petition for reconsideration filed September 24, 1990 by Richardson Broadcasting Group IS DENIED.

FEDERAL COMMUNICATONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Board also has before it an RBG "Petition For Leave to Amend," filed October 2, 1990, reporting that RBG has filed with the Commission an application to assign the license for station WEEB(AM). RBG notes that the assignment is consistent with a prior divestiture pledge and will not "upgrade" its application.

We will accept RBG's petition pursuant to Section 1.65 of the rules, but emphasize that the alienation of WEEB(AM) does not cancel the concerns raised in the *Decision*, 5 FCC Rcd at 5291 (para. 25), as to whether RBG was candid with the Commission regarding the financial problems of that station, especially as they might have affected its proposed FM transmitter site.

[2] Reconsideration Petition at 2 (quoting *Decision* (at para. 25)).

[3] *See* Younts Reply at 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-119

In re Applications of

BREEZE BROADCASTING COMPANY, LTD.	File No. BPH-840503IC
MARANATHA BROADCASTING COMPANY, INC.	File No. BPH-850712ME
J. McCARTHY MILLER	File No. BPH-850712NT
GULF BREEZE BROADCASTING CO.	File No. BPH-850712OE

For Construction Permit for New FM Station, Channel 237A, Gulf Breeze, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1990; Released: October 31, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In an *Initial Decision*, 5 FCC Rcd 26, 33 (1990) (*I.D.*), presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) granted the application of Breeze Broadcasting Company, Ltd. (Breeze) because he found Breeze to be the best comparative applicant. The proceeding is now before the Review Board on exceptions and reply briefs filed by each of the applicants. Oral argument was heard on June 1, 1990. Based on our review of the record, it appears that the competing application of J. McCarthy Miller is among the comparatively superior applicants. However, in a post-oral argument motion to reopen the record and enlarge issues filed on July 27, 1990, Breeze has raised substantial and material questions regarding Miller's basic financial qualifications. Thus, we must remand this proceeding to the ALJ for resolution of those questions.

2. *Background*: In its motion to reopen the record and enlarge issues, Breeze alleges that on December 3, 1987, almost a year-and-a-half after Miller filed his instant Gulf Breeze application, Miller filed an application for a new FM station at Orange Beach, Alabama. Based on a petition to enlarge issues in Orange Beach (which disclosed that Miller had had a large number of applications pending before the Commission), the Orange Beach ALJ (Judge Sippel) added a financial qualifications issue against Miller. *Mark Allen Bodiford*, FCC 89M-2430, released October 5, 1989. Shortly thereafter, Miller withdrew his Orange Beach application, so that the basic qualifications issue raised there was not resolved. Grounded on deposition testimony and documents produced in the Orange Beach proceeding (which Breeze alleges that it only recently obtained), Breeze essentially claims that Miller's filing of a large number of pending applications before the Commission during the pendency of his Gulf Breeze application committed Miller to meet an aggregate amount of construction and initial operating costs exceeding his resources. In short, given Miller's financial commitments to his many contemporaneous FCC applications, Miller must demonstrate here the resources he avoided demonstrating in Orange Beach. Our review of Miller's application for Gulf Breeze and the pleadings support Breeze's contention that further hearing is mandatory.

3. Specifically, in the Gulf Breeze application as originally filed on July 12, 1985, Miller disclosed that M & M Communications, Inc., a company of which Miller is president and 51% owner, was the recent lottery selectee for two low power television (LPTV) stations. It also had 53 more LPTV applications pending before the Commission (and it had had an additional 29 LPTV applications returned as defective). Miller Application, FCC Form 301, Exh. II-1. Breeze alleges that Miller's 51% share of the cost to construct (and initially operate) each LPTV station would be $44,880 (or a total of $2,464,000 for the 55 pending applications and construction permits).

4. In addition, Breeze alleges that subsequent to the filing of the instant Gulf Breeze application (but prior to 1987), Miller Communications, Inc., 50%-owned by Miller, "filed some 90 cellular applications, one for every market 91 to 180." Breeze Motion, filed July 27, 1990, at 9. Breeze claims that Miller estimated the costs for the Binghamton cellular system (for which a restructured company controlled by Miller eventually received a grant) to be $2,279,000. Breeze calculates that the "financial demands associated with 90 such proposals would therefore exceed" $200,000,000. *Id.* Finally, Breeze alleges that, on August 31, 1987, another company 70%-owned by Miller filed an application for a new FM station at Biltmore Forest, North Carolina, and that Miller there had estimated his costs to be $222,500 (the same figure as for his since-dismissed Orange Beach application). *Id.* at 9-10. Miller estimated his costs for the proposed Gulf Breeze station to be $272,500. *Id.* at 7.

5. With regard to Miller's available financial resources, Breeze offers Miller's personal financial statement, dated December 22, 1987, which lists "cash and equivalents" of $140,500 (*i.e.*, $20,500 cash and the balance in gold and silver), notes receivable (but not discounted) of $656,500, stock (almost entirely in Miller-controlled Miller Communications, M & M Communications, and MDS of Monroe), subjectively valued by Miller at $4,360,640, with a claimed net worth of $5,278,640. *Id.* at 8-9; Att. 4 at 5; Att. 9.

6. Miller responds:

> Mr. Miller has consistently made it clear that this Gulf Breeze application is his primary media interest. This application for his home town is the only one for which he has made an integration commitment. He has also proposed to divest all LPTV, all MDS interests, and the Orange Beach application if the Gulf Breeze application is granted. (The Orange Beach application has, of course, already been voluntarily dismissed). Because of his broad divestiture

> commitments, Mr. Miller would never have been constructing and operating Gulf Breeze at the same time that he held any other media interest except Biltmore Forest. Thus, the seemingly vast array of media interests presented by Breeze is an illusion: Mr. Miller would be required to dismiss or eliminate all such media interests if he is successful here, so there would be no "overlapping" of obligations.

Miller Consolidated Opposition at 14-15 (footnote omitted). Second:

> Mr. Miller's current potential media obligations consist of this application and the Biltmore Forest FM application (which was denied in an Initial Decision). M&M Communications, Inc. owns two licensed LPTV stations and one unconstructed CP. There are no pending LPTV applications. There are no pending MDS applications or unconstructed facilities, and none of Miller Communications, Inc.'s applications were selected in recent cellular lotteries.

Id. at 15. Third:

> [A]s noted by Mr. Miller in his Declaration, *none* of Miller Communications, Inc.'s cellular applications relied on Mr. Miller's personal finances; they were supported by independent bank letters. Thus, those applications are irrelevant to whether he has the personal resources to finance the construction and operation of the Gulf Breeze station. Moreover, both of the cellular systems in which his 50%-owned company held a controlling interest were constructed without resort to either his or his company's funds.

Id. Finally:

> Mr. Miller has achieved some success in the course of his business career and therefore holds an enviable cash position. As is documented in Attachment D, he had $1,575,015 in highly liquid funds as of February 1, 1990. These funds are in interest bearing money market accounts or the like, and have *increased* since the early part of this year. In addition, as of that time Mr. Miller had (and continues to hold) $1,170,000 worth of readily "liquidable" assets. (*See* Blow appraisal in Attachment D). Similarly, in the latter part of 1987, Mr. Miller was liquidating an asset which yielded over $1.5 million in cash. Thus, Mr. Miller's ability to finance the projects in which he is involved cannot seriously be doubted. *Id.*

Id. at 16.

7. *Discussion* : We immediately observe that Miller's responsive pleading does not fully address the concerns first expressed by the Orange Beach ALJ, and repeated by Breeze. The sheer number of Miller applications pending when his instant Gulf Breeze application was filed (and subsequently) is now several times the number reckoned in Orange Beach. *See Bodiford, supra*, at paras. 3-5. Miller's suggestion that his other applications are simply irrelevant to his financial qualifications here (because "Gulf Breeze . . . is . . . primary") begs the question. Applicable precedent holds that an applicant must be financially able to construct and operate *all* of its FCC proposals, and Miller's claim of current financial qualifications does not satisfy the operative inquiry. In this regard, his outstanding applications appear cumulatively to have required funds equal to several times his asserted net worth. Next, his alleged reliance on "independent bank letters" to finance his cellular applications does not reveal whether his assertedly "liquidable" assets would have been encumbered by any such bank loans. Finally, his assertion of current liquidity does not reveal the extent to which his claimed assets were readily liquidable at the time of his original financial certification.

8. Under the Commission's financial certification requirements at the time Miller filed his application, *Revision of Form 301*, 50 RR 2d 381 (1981), applicants "must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months *before* the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing." *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989). To establish its financial qualifications, an applicant must have had reasonable assurance of resources when it originally certified to its financial qualifications, *Marlin Broadcasting of Central Florida, Inc.*, FCC 90-320, released October 4, 1990, at para. 6; *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3198 (Rev. Bd. 1990); *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990).

9. In addition, where an applicant has filed multiple applications before the Commission:

> it must be able to demonstrate that it is financially qualified as to all pending applications. *See George Edward Gunter*, 104 FCC 2d 1363 (Rev. Bd. 1986); *Welch Communications, Inc.*, 5 FCC Rcd 4850 (Rev. Bd. 1990). *See also Public Notice on Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987) (advising applicants that processing staff may question validity of the applicant's financial certification where applicant has large number of pending broadcast applications).

Texas Communications Limited Partnership, FCC 90R-90, released October 17, 1990, at para. 11. We realize that many of Miller's applications were for LPTV stations or cellular radio systems rather than traditional broadcast facilities. Nevertheless, after reviewing Commission precedent, we hold that a broadcast applicant cannot be considered to be financially qualified if it cannot demonstrate its financial qualifications to build contemporaneously the facilities proposed in parallel FCC applications.

10. Historically, the LPTV financial qualifications standard has been identical to that for broadcast applicants. *See, e.g., Low Power Television Service, Report and Order* (BC Docket No. 78-253), 51 RR 2d 476, 501, 536 (1982) (identical financial certification required). Although the Commission, in 1984, deleted the requirement that an LPTV applicant certify or otherwise disclose its financial qualifications, it explained:

> Because a strict one-year construction period is applied to low power television . . . authorizations, *a mechanism for post-lottery enforcement is in place that will provide for termination of authorizations won without appropriate financial backing.*

Low Power Television Service (Filing Windows), Report and Order (MM Docket No. 83-1350), 57 RR 2d 234, 237 (1984) (emphasis added). In other words, the Commission continued to expect that LPTV applicants would possess "appropriate financial backing," but found that Commission resources would be more efficiently expended by reliance upon the strict one-year LPTV construction period for enforcement than upon applicant financial certification and adjudicatory disclosure. Nothing in the LPTV rule-making proceedings indicates that the Commission intended to ignore a broadcast applicant's outstanding financial commitments to build its proposed LPTV stations, especially where the latter are numerous and represent a substantial financial commitment.

11. As is the case in the broadcast services, the Commission requires cellular radio common carrier applicants to demonstrate reasonable assurance of funds availability. In fact, the Commission has recently stated, the " *basic reasonable assurance standard is the same for both broadcasting and cellular common carriers*, although the precise filing rules are different." *MMM Holdings, Inc.*, 4 FCC Rcd 6838, 6842 (1989)(footnote omitted; emphasis added). Furthermore, the cellular filing rule which sets forth an applicant's burden to demonstrate its financial qualifications, 47 CFR §22.917, explicitly requires applicants to show that they have the financial commitments needed to fund *all* of their pending proposals. Thus, in demonstrating the availability of funds to meet construction and initial (one-year period for cellular, as opposed to 90 days for broadcasting) operating costs for the "top-120" cellular markets, an applicant must not rely upon "funds committed to another project, or committed in another cellular application." 47 CFR §22.917(a)(2). Applications for markets beyond the "top-120" are subject to a random selection (*i.e.*, lottery) process, and the tentative selectee has 30 days from Public Notice of its selection to amend the application to demonstrate "a firm financial commitment." 47 CFR §22.917(b)(1). Where this "firm financial commitment" is derived from internal financing, the applicant "must submit the information required by 47 CFR §22.917(a)(3), current within 90 days of the submission date of the financial information in conformance with generally accepted accounting principles, to demonstrate its financial ability." 47 CFR §22.917(b)(1)(ii). In turn, the information required by §22.917(a)(3) includes a demonstration of reliance upon funds not committed to another project or cellular application, pursuant to Section 22.917(a)(2), *supra*. Finally, even "rural service area" cellular applicants must show that their proposed funding commitment is sufficient to cover the costs of all of their proposed rural service area systems. 47 CFR §22.917(c)(1)(i), (ii), (iii).

12. In sum, the Commission's entire regulatory scheme implementing the statutory requirement of Section 308(b) of the Communications Act, 47 U.S.C. §308(b), that applicants be financially qualified presupposes that applicants are financially ready, willing, and able to build all of their proposed facilities. *See Tri-State Communications*, 4 FCC Rcd 8258, 8259 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 534 (Rev. Bd. 1990), *review denied*, FCC 90-347, adopted October 11, 1990. On the record before us, we share the Orange Beach ALJ's view that substantial and material questions of fact exist as to whether, in view of Miller's numerous other applications pending when he filed his instant Gulf Breeze application (and thereafter), Miller was financially qualified when he certified. And, if so, whether he has remained financially qualified throughout the pendency of these applications. We must therefore remand this proceeding on an appropriate issue. Should it develop during discovery or at the remanded hearing that other substantial and material questions of fact emerge (*e.g.*, misrepresentation), the ALJ has the sound discretion to add the appropriate issues. *Mableton Broadcasting*, FCC 90R-99, adopted October 15, 1990, at para. 40; *Charisma Broadcasting Corp.*, 5 FCC Rcd 2916, 2917-2918 (Rev. Bd. 1990).

13. In its Motion, Breeze also claimed that Miller failed to report the dismissal of its Orange Beach application and requested that issues be added to explore Miller's alleged concealment of a financial qualifications issue added (but never tried) in that proceeding, and to add a misrepresentation issue. We deny these portions of Miller's motion. First, Miller has shown that Breeze has overlooked Miller's March 26, 1990 amendment which reported its Orange Beach dismissal. Miller Consolidated Opposition, filed August 13, 1990, at 6-7 and Att. C. Second, Breeze has misread *Shawn Phelan*, 5 FCC Rcd 2622 (Rev. Bd. 1990), to hold that a financial qualifications issue which requires an applicant to demonstrate it was financially qualified when it originally so certified is tantamount to a misrepresentation or character issue; it is not. *See Charisma Broadcasting Corp., supra* (adding issue to explore original financing, but leaving to ALJ's discretion further decision whether to add false certification/misrepresentation issues based on upcoming document exchanges). Therefore, addition of the Orange Beach financial issue need not have been reported here, nor be retried here pursuant to *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-374 (1980). *Cf. Rebecca Radio of Marco*, 5 FCC Rcd 830, 835 n.2 (1989) (non-character issues need not be inquired into further).

14. We note, however, that because the financial postures here and in Orange Beach appear strikingly similar, the issue we add should provide Breeze what it in substance seeks: the opportunity to explore and challenge Miller's financial qualifications. Finally, we reject Breeze's request for a misrepresentation issue against Miller predicated on a dispute between them as to whether, during aborted settlement negotiations, Miller stated he habitually takes 3-4 month annual vacations or was doing so this summer only. While the factual substance of this dispute relates directly to whether Miller's claimed 100% quantitative integration credit is supportable, we nevertheless will not add an issue based on a breach of the confidentiality of settlement negotiations. *See* Fed. R. Evid. 408. In closing, we note that we have not discussed Miller's challenge to the timeliness of Breeze's motion, but assuming *arguendo* that it is tardy, we nevertheless would add the financial issue because of its substantial public interest importance and probable decisional significance. *See* 47 CFR §1.229(c); *Edgefield-Saluda*, 5 FCC Rcd 148 (1966).

15. ACCORDINGLY, IT IS ORDERED, That the "Motion to Reopen the Record and Enlarge Issues" filed on July 27, 1990 by Breeze Broadcasting Company, Ltd. IS GRANTED IN PART and DENIED IN PART, and that

this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a Supplemental Initial Decision on the following issue:

To determine whether J. McCarthy Miller was financially qualified at the time he certified to his financial qualifications, has remained financially qualified throughout the pendency of his application, and is currently financially qualified.

16. IT IS FURTHER ORDERED, That the "Second Motion to Reopen the Record and Enlarge Issues" filed on July 31, 1990 by Breeze Broadcasting Company, Ltd. IS DENIED. [1]

17. IT IS FURTHER ORDERED, That the unopposed petition for leave to amend filed April 20, 1990 by Gulf Breeze Broadcasting Company and the unopposed "Motion to Withdraw Notice and Substitute Corrected Notice" filed May 23, 1990 by J. McCarthy Miller ARE GRANTED, and the respective amendment and corrected notice ARE ACCEPTED.

18. IT IS FURTHER ORDERED, That the "Motion to Strike" filed February 9, 1990 by Maranatha Broadcasting Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] In its "Second Motion," Breeze seeks issues to explore Miller's alleged failure to report the adverse resolution of a site availability issue against his 70%-owned applicant in the Biltmore Forest proceeding by an Initial Decision, *National Communications Industries*, 5 FCC Rcd 2862, 2864, 2879 & n. 7 (1990) (site amendment rejected, applicant disqualified, ALJ opines that acceptance of amendment would have required addition of misrepresentation issue), and to add a lack of candor issue regarding the Biltmore Forest transmitter site. We deny this motion because: (1) no actual character issue was added or tried in Biltmore Forest, *see Rebecca Radio, supra*, at n. 2 (site availability issue is not a character issue); (2) Miller has demonstrated reliance there on a written site option and, thus, the absence here of a substantial and material question of fact on the requested issue requiring any further hearing; and (3) the Biltmore Forest proceeding (MM Docket No. 88-577) is currently before the Board on exceptions, and the site availability issue will be reviewed in our deliberations there.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS & SAN JUAN TELEPHONE CO. File No. I-T-C-90-075

Application for authority to acquire and operate facilities for service between the U.S. Virgin Islands and the Dominican Republic.

ORDER AND AUTHORIZATION

Adopted: October 24, 1990; Released: October 31, 1990

By the Chief, International Facilities Division:

1. The above-captioned application was filed on March 13, 1990 and supplemented by letter dated August 13, 1990 by St. Thomas & San Juan Telephone Co. (STSJ). The application requests authority pursuant to Section 214 of the Communications Act of 1934, to acquire and operate additional facilities for service between the U.S. and the Dominican Republic. The application was placed on public notice on March 21, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-075 IS GRANTED, and STSJ is authorized to:

a. acquire from Telefonica Larga Distancia de Puerto Rico (TLD) on an Indefeasible Right of Use (IRU) basis or lease and operate a one-half interest in 24 voice-grade circuits in microwave facilities between Santo Domingo, Dominican Republic, and San Juan, Puerto Rico;

b. acquire from AT&T on an IRU basis and operate a half interest in 14 circuits in Segment G of the TCS-1 cable system between San Juan, Puerto Rico and Santo Domingo, Dominican Republic;

c. connect the circuits in a and b above to STSJ's point of presence on St. Thomas, U.S. Virgin Islands via microwave facilities owned by STSJ; and

d. use said facilities to provide STSJ's regularly authorized services, including switched voice service, between the U.S. Virgin Islands and the Dominican Republic and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between STSJ and its correspondent in Dominican Republic, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules 47 C.F.R. §43.61 (October 1, 1989).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Hector Nicolau
(Assignor)

and File No. BALCT-881230KH

International Broadcasting
Corporation
(Assignee)

For Assignment
of License of
Television Station
WTIN, Channel 14,
Ponce, Puerto Rico

Seglares Iglesia
Catolica, Inc.
(Assignor)

and File No. BALCT-890705KF

Southwestern
Broadcasting
Corporation
(Assignee)

For Assignment of
License of Television
Station WVEO, Channel 44,
Aguadilla, Puerto Rico

Southwestern File No. BPCT-890927KE
Broadcasting
Corporation

For Minor Modification
of License of
Television Station WVEO,
Channel 44,
Aguadilla, Puerto Rico

Seglares Iglesia File No. BRCT-861203KE
Catolica, Inc.

For Renewal of
License of Television
Station WVEO, Channel 44,
Aguadilla, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1990; Released: October 31, 1990

By the Commission:

1. The Commission has before it for consideration: (1) an application to assign the license of television station WTIN (channel 14), Ponce, Puerto Rico, from Hector Nicolau to International Broadcasting Corporation; (2) an application to assign the license of television station WVEO (channel 44), Aguadilla, Puerto Rico, from Seglares Iglesia Catolica, Inc. (Seglares), to Southwestern Broadcasting Corporation; (3) an application for minor modification of television station WVEO, filed by Southwestern Broadcasting Corporation; and (4) an application for renewal of license of television station WVEO, filed by Seglares. Both International Broadcasting Corporation and Southwestern Broadcasting Corporation are controlled (100 percent) by Pedro Roman Collazo (Collazo). The applications are not opposed.

2. Acquisition of WTIN and WVEO, which are within approximately 47 miles of each other, will result in the predicted Grade B contours of each station overlapping that of the other in contravention of Section 73.3555(a)(3) of the Commission's Rules, which generally prohibits common ownership of two television stations whose Grade B contours overlap. However, Collazo proposes to operate WVEO as a 100-percent satellite of WTIN and requests that the assignment application be granted pursuant to the exception for satelliite operations set forth in Note 5 to the Commission's multiple ownership rule, Section 73.3555.[1]

3. Collazo also notes that he controls station WBOZ-FM, Hormigueros, Puerto Rico, and that the Grade A contour of WVEO encompasses Hormigueros.[2] Section 73.3555(b) of the Commission's broadcast multiple ownership rule prohibits the acquisition of a television station if its Grade A contour encompasses the community of license of a commonly controlled FM station. However, Note 5 to Section 73.3555 provides that the prohibitions contained in paragraphs (a) through (d) of the rule will not be applied to cases involving television stations operated as satellites. In addition, Note 7 to this rule provides that the Commission will consider waiver of Section 73.3555(b)'s restriction for proposals meeting either of two standards: (1) those involving the top-25 television markets where there will remain at least 30 separately owned licensees; and (2) those involving failed stations which have not been operated for a period of time or are in bankruptcy. Note 7 also provides that other waiver requests will be evaluated on a case-by-case basis. *See Amendment of Section 73.3555*, 4 FCC Rcd 1741, *recon. in part*, 4 FCC Rcd 6489 (1989). Collazo therefore requests a grant of the WVEO assignment application pursuant to the appropriate standards of the Rule.

BACKGROUND

4. Collazo states that Puerto Rico is an island approximately 125 miles long (east to west) and approximately 30 miles wide (north to south), with a central mountain range separating the island (east to west); and having a population of 3.3 million persons. He asserts that Puerto Rico is a highly concentrated broadcast market that has

more than 100 radio stations and more than 30 television stations. He notes that San Juan, located on the northeast coast of the island, is the commercial center of Puerto Rico and its principal port, and dominates the island's economy. The San Juan-Caguas standard consolidated statistical area (SCSA) accounts for approximately 39 percent of the island's population. WVEO and WTIN are not located in the San Juan-Caguas SCSA. WTIN, located in Ponce, is on the south coast and on the other side of the mountain range that separates Ponce from San Juan. WVEO, in Aguadilla, is at the northwest corner of the island and is approximately 70 miles west of San Juan. The Ponce standard metropolitan statistical area (SMSA) includes 7.9 percent of the island's population (253,285 persons), while Aguadilla, which does not qualify as an SMSA but is an "urban area," includes 0.7 percent of the island's population (7,432 persons).[3]

5. Collazo also states that television in Puerto Rico is dominated by VHF stations, in particular WSTE (channel 7), Ponce, which has a four-transmitter, island-wide, experimental operation. He asserts that six other dominant VHF stations provide but three program services, with duplicating pairs, in a manner analogous to television networks on the United States mainland. One pair is comprised of commonly owned WSUR-TV (channel 9), Ponce, and WLII (channel 11), San Juan-Caguas, which is a satellite of WSUR-TV. In addition, stations WKAQ (channel 2) San Juan and WAPA-TV (channel 4) San Juan, not commonly owned, are rebroadcast virtually in the entirety by WOLE-TV (channel 12), Aguadilla, and by WORA-TV (channel 5), Mayaguez, respectively.

6. Further, Collazo asserts that WVEO has been off the air and in bankruptcy since 1985.[4] In that regard, he states that there was an attempt by Seglares to assign the television station to James C. Leake, who proposed to operate WVEO as a 100-percent satellite of WPRV-TV (channel 13) in Fajardo. The Commission approved the assignment application, but granted it on condition that James C. Leake construct a main studio in Aguadilla and commence some local origination, thus operating the station primarily as a satellite, no later than 18 months after WVEO resumed operating. *Seglares Iglesia Catolica, Inc.*, 2 FCC Rcd 7539 (1987). Collazo notes that the assignment was not consummated. With respect to the Commission's conditional approval of a satellite operation in that case, Collazo represents that, if the Commission determines that operating the station primarily as a satellite is preferable, he will accept a grant of the application with the same condition imposed on Leake. Turning to WTIN, Collazo states that the station is also in distress and its licensee, Hector Nicolau, who has a heart condition, has been advised by his doctor to give up the station. He also notes that WTIN rebroadcasts the programming of WPRV-TV (Channel 13) in Fajardo, and that WPRV-TV is involved in a Chapter XI bankruptcy proceeding. Thus, he believes that future operation of WTIN is uncertain.

SATELLITE PROPOSAL

7. In support of his satellite proposal, Collazo has submitted an engineering study conducted by an independent consulting firm. The study indicates that the predicted Grade B contour of WTIN encompasses 857.6 square miles and a population of 571,999 persons and that the predicted Grade B contour of WVEO encompasses 1,115 square miles and a population of 662,865 persons. It also reveals that the overlap area encompasses 292 square miles and a population of 143,043 persons which represents 34.09 percent of WTIN's predicted Grade B contour and 25.01 percent of the population within its Grade B contour, and 26.21 percent of WVEO's predicted Grade B contour and 21.58 percent of the population within its Grade B contour. In view of the mountainous terrain that lies between WVEO and WTIN, the consultant stated that the actual overlap area would be substantially less than that based on the standard prediction method.

8. In addition, while again noting the mountainous terrain that exists in Puerto Rico, Collazo contends that there are two television markets, Ponce and Aguadilla-Mayaguez, that will be served by WTIN and WVEO.[5] He states that the Ponce television market has five other television stations authorized to it, in addition to WTIN. These stations include two VHF stations (WSUR-TV, channel 9; and WSTE, channel 7), and three UHF stations (WKPV, channel 20; noncommercial educational WQTO, channel 26; and WIEC, channel 48). The Aguadilla-Mayaguez television market, the proposed satellite market, has seven other television stations in addition to WVEO. These include three VHF stations (WORA-TV, channel 5; WOLE-TV, channel 12; and noncommercial educational WIPM-TV, channel 3), and four UHF stations (WTRA, channel 16; WNJX-TV, channel 22; noncommercial educational WELU, channel 32; and WJWN-TV, channel 38).

9. Collazo states that all the stations in the Aguadilla-Mayaguez market either operate as a satellite or rebroadcast the programming of another station. See paragraph 5 above. Thus, Collazo concludes that if these satellite and rebroadcast arrangements are in the public interest, operating WVEO as a satellite is clearly justified.

DISCUSSION

10. *Television Satellite Proposal* In the past, we recognized that the severe and rugged terrain conditions existing in Puerto Rico have a significant limiting affect on the actual over-the-air coverage of television stations operating on the island. We determined that the over-the-air coverage may be more limited than the coverage indicated by calculated Grade A and B contours,[6] and sometimes coverage may not be satisfactory within the Grade A contour.[7] To overcome these terrain limiting conditions and to permit television operations to be viable in Puerto Rico, we have authorized satellite operations such as that involving WVEO noted above in *Seglares Iglesia Catolica, Inc.* In that situation, we noted that satellites were authorized as a means of providing service to small communities having an insufficient economic base to support a full-service television operation. In that respect, Note 5 to Section 73.3555 of our rules relaxes the multiple ownership rule for a station operating as a satellite or "primarily" as a satellite. Here, we find that, as we found before,[8] satellite operation of WVEO is justified. First, while the predicted overlap between WTIN and WVEO is not insubstantial, the areas between the stations is mountainous and neither station is likely to be received much beyond its immediate community of license. Second, even though these communities of license and their respective surrounding areas are not underserved or unserved, the economic conditions existing in Puerto

Rico indicate that satellite operations or rebroadcast arrangements are a necessity. *Channel 7 Puerto Rico*, above, at 1151. Third, because of "linguistic and possibly other reasons, very little U.S. television network programming as such is used . . . although a great deal . . . is network material with Spanish dialogue dubbed in." *Id.* Thus, as a result of these three factors, without the use of satellite operations or rebroadcast arrangements, television operations and programming choices beyond San Juan would be limited. Further, while independent ownership and operation of WVEO might lead to greater diversity of viewpoints, we are not unmindful of the station's past financial difficulties and we believe that approval of this sale would be the surest way to provide an additional choice of programming for the residents of Aguadilla in the immediate future. In view of the fact that another full-service television station is licensed to Aguadilla, we will require, as we did before, that a main studio be constructed in Aguadilla and that some local program origination commence no later than 18 months after the television station begins operating. *Meyer Broadcasting Company*, 67 FCC2d 593 (1978), *aff'd sub nom., Dickinson Broadcasting Corp. v. F.C.C .*, 593 F.2d 1371 (D.C. Cir. 1979).

11. Television and Radio Cross-Ownership Regarding WVEO's encompassment of WBOZ-FM and its community of license, Hormigueros, Note 7 to Section 73.3555 of our rules provides that waiver of the cross-ownership prohibitions of radio and television stations will be permitted if the request meets either of two standards: (1) those involving combinations in the top-25 television markets having at least 30 separately owned licensees; (2) those involving "failed stations" that have been off the air for at least four months or are in bankruptcy. In adopting Note 7, we stated that we were predisposed toward granting waivers involving failed stations because benefits to the public would outweigh any cost to diversity. *Amendment of Section 73.3555*, 4 FCC Rcd at 1752. Here, WVEO has been off the air and in bankruptcy since 1985, and we believe that cross ownership would enhance the return of station WVEO to the air and provide Aguadilla with another video outlet. Moreover, Note 5 to Section 73.3555 permits common ownership of an FM and television station operating primarily as a satellite when the Commission has determined that such operation is in the public interest. We believe that common ownership will serve the public interest in this case.

CONCLUSION

12. In view of the foregoing, and having found that the applicants are fully qualified, we conclude that a grant of the above-noted applications would serve the public interest, convenience and necessity.

13. Accordingly, IT IS ORDERED, That the application (BALCT-881230KH) for consent to assign the license of television station WTIN, Ponce, Puerto Rico, from Hector Nicolau to International Broadcasting Corporation, IS GRANTED.

14. IT IS FURTHER ORDERED, That waivers of Section 73.3555 of the Commission's Rules ARE GRANTED; and that the application (BALCT-890705KF) for consent to assign the license of television station WVEO, Aguadilla, Puerto Rico, from Seglares Iglesia Catolica, Inc. to Southwestern Broadcasting Corporation, IS GRANTED, subject to the following condition:

> The licensee shall construct a main studio in Aguadilla, Puerto Rico, and commence origination of some local programming no later than 18 months after television station WVEO starts operating.

15. IT IS FURTHER ORDERED, That the application (BPCT-890927KE) for minor modification of license of television station WVEO, Aguadilla, Puerto Rico, filed by Southwestern Broadcasting Corporation, IS GRANTED.

16. IT IS FURTHER ORDERED, That the application (BRCT-861203KE) for renewal of license of television station WVEO, Aguadilla, Puerto Rico, filed by Seglares Iglesia Catolica, Inc., IS GRANTED subject to the following conditions:

> a) The assignment of license of television station WVEO, Aguadilla, Puerto Rico (BALCT-890705KF), shall be consummated within sixty (60) days of the date of grant of that application and the Commission shall be notified of such consummation promptly and that WVEO will resume broadcasting within ninety (90) days after consummation of the grant of the assignmentf application. Failure to meet these conditions within the periods indicated, unless extended pursuant to a good cause showing, will render the grant of the renewal of license application WVEO null and void and will cause the renewal application to revert to pending status.
>
> b) In the event that WVEO returns to the air before completing construction of the modified facilities authorized herein, that ten days prior to commencement of regular programming operation, the assignee shall submit a certification that equipment performance measurements were made in accordance with Section 73.1590 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent's programming but originates less than five percent of its programming locally. *See, e.g., Amaturo Group, Inc*, 68 FCC 2d 899 (1978).

[2] In filing the application to modify WVEO's facilities, Collazo proposes a more modest operation of WVEO in an apparent effort to reduce operating costs. We find that a grant of the modification application will serve the public interest. Collazo also controls WVOZ(AM), Carolina, and WVOZ-FM, San Juan, Puerto Rico; neither are located within the Grade A contour of either WTIN or WVEO. Also, he recently filed an application (BALCT-900709KL) to acquire television station WSJU in San Juan, Puerto Rico, which will be considered in due course.

[3] The population and statistically described areas were taken from the 1980 U.S. Census of Population for Puerto Rico, PC 80-1-A53.

[4] Since WVEO is off the air and in bankruptcy, its pending application for renewal of license has been deferred. In view of our determination regarding a grant of the WVEO assignment application, we will grant WVEO's renewal application on condition that the assignment application be consummated within sixty days of grant and that the station resume broadcasting within ninety days of consummation (extendable by the staff upon a showing of good cause). Otherwise the grant of the renewal application will be rescinded.

[5] As noted above, the population of Ponce is 253,285 persons, or 7.9 percent of Puerto Rico's population, and the population of Aguadilla is 7,438 persons or 0.7 percent of the island's population. Mayaguez's SMSA has a population of 133,497 persons or 4.2 percent of the island's population.

[6] *Zaida Perez Vda. de Perez Perry*, FCC 85-831, released July 26, 1985, at paragraph 11, *aff'd sub nom., Telemundo v. F.C.C.*, 802 F. 2d 513 (D.C. Cir. 1986).

[7] *Channel 7, Puerto Rico*, 58 FCC 2d 1148, 1151 (1975).

[8] *Seglares Iglesia Catolica, Inc.*, above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Amateur	RM-7401
Service Rules to Revise	RM-7402
Transmitter Power Standards and	RM-7403
Authorized Emissions	RM-7404

ORDER

Adopted: October 24, 1990; Released: October 31, 1990

By the Chief, Private Radio Bureau:

1. Before the Commission are four petitions for rule making[1] relating to the transmission of emission type A3E, commonly referred to as AM,[2] in the amateur service. One petition, RM-7401, seeks to remove emission type A3E from Section 97.3(c)(5) of the Commission's Rules, 47 C.F.R. § 97.3(c)(5), asserting that, with two exceptions, AM usage has been generally supplanted by emission type J3E (single sideband or SSB). [3] In sharp contrast, the other three petitions, RM-7402, RM-7403, and RM-7404, seek to amend Section 97.313(b) of the Commission's Rules, 47 C.F.R. § 97.313(b), to promote AM by allowing amateur stations transmitting AM a maximum output power two to four times greater than the power allowed stations transmitting any other emission type. More specifically, RM-7402 requests that the June 2, 1990, sunset date[4] of the AM exception to the power limitation be deleted.[5] RM-7403 requests that a station transmitting AM be allowed to use a carrier output power[6] of 1.5 kW, rather than the present standard of 1.5 kW output peak envelope power (PEP).[7] Similarly, RM-7404 requests that a station transmitting AM be allowed to use a carrier output power of 0.75 kW.[8]

2. In response to Public Notice of the petitions,[9] we received more than 820 comments and reply comments. The comments were generally opposed to RM-7401 and supportive of RM-7402, RM-7403, and RM-7404. Most of the commenters either stated a personal preference for AM operation[10] or contended that interest in vintage radio equipment[11] and AM operation generally has increased in recent years.[12] Each comment and reply has been carefully considered. We conclude that the petitions do not present new or novel questions of fact, law, or policy. Accordingly, we dismiss the four petitions for rule making as repetitious for the reasons discussed below.

3. In 1981, the Commission considered a petition for rule making requesting the same rule amendment asked for in RM-7401.[13] The Commission denied the petition, stating that it conflicted with the Commission's goals for the Amateur Radio Service. Deleting AM as an authorized emission still is inconsistent with the basis and purpose of the amateur service[14] and our desire to offer amateur operators the opportunity to experiment with practically every conceivable type of emission.[15] We therefore dismiss RM-7401 with no further action.

4. In regard to the other three petitions, the ARRL, Gagnon, and SPAM argue that the Commission indicated that it would reconsider its decision[16] phasing out the higher power authorization for an AM emission if there were any justification to do so.[17] All three petitioners claim that increased interest in AM since 1983 is the justification for the Commission to reconsider its 1983 power measurement decision.[18] The petitioners do not persuade us that there is sufficient justification to raise the power limit, as AM emissions continue to be an authorized form of amateur emissions.

5. The issue of specifying a transmitter power standard for AM that is different than the power standard for the other 1300 emission types is an issue the Commission has previously considered and denied.[19] Further, the Court of Appeals, in affirming this decision, found that the Commission's action was based on consideration of the relevant factors and was supported by a reasoned opinion.[20] The arguments raised by the ARRL,[21] Gagnon, and SPAM[22] are the same as those the Commission considered and rejected in that proceeding. The petitioners have presented no reason for us to revisit this matter. Further, the petitioners have not shown that interest in AM operation today significantly exceeds the Commission's 1983 estimate of the interest in AM[23] or that the expiration of the higher power authorization to AM stations is having any unanticipated effect on these stations.

6. For the above reasons, the amendments requested by the petitioners would provide no significant benefits for the amateur service or the public and are not warranted. IT IS THEREFORE ORDERED, pursuant to Sections 0.131, 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331 and 1.401(e), that the petitions for rule making, RM-7401, RM-7402, RM-7403 and RM-7404 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Petitions for rule making were filed by William B. Prechtl (Prechtl) (RM-7401), The American Radio Relay League, Inc. (ARRL) (RM-7402), the Society for the Promotion of Amplitude Modulation (SPAM) (RM-7403), and Dale Gagnon (Gagnon) (RM-7404).

[2] *See* Section 2.201 of the Commission's Rules, 47 C.F.R. § 2.201, for information relating to the system of designating emission types and modulation characteristics of radio waves.

[3] Prechtl petition at 1.

[4] Prior to June 2, 1990, amateur stations transmitting an AM emission were exempt from the 1.5 kW peak envelope power (PEP) maximum power requirement and subject only to the 1 kW direct current power input limitation. This limitation translates into an equivalent PEP output of approximately 3 kW.

[5] ARRL petition at 5.

[6] Carrier output power is the average power supplied to the antenna during one radio frequency (RF) cycle under the condition of no modulation. PEP is the average power supplied to

the antenna during one RF cycle at the peak of the modulation envelope. A carrier output power of 1.5 kW is four times greater than a PEP output of 1.5 kW.

[7] SPAM petition at 8.

[8] Gagnon petition at 2-5.

[9] *See Public Notice*, Report No. 1819, June 27, 1990.

[10] For example, *see* comments of Phillip Gagnon at 1, Barbara White at 1, Robert Harrison at 1, Courtney Hall at 1.

[11] For example, *see* comment of Ron Cole at 1.

[12] For example, *see* comments of Allen Steiner at 1, Charles Croatman, Jr. at 1, Joseph Neiman at 1, Rodney Sheffer at 1.

[13] *See Order*, RM-3665, released March 4, 1981.

[14] *See* Section 97.1 of the Commission's Rules, 47 C.F.R. § 97.1.

[15] 4 FCC Rcd 4719 (1989).

[16] *See Report and Order*, 48 Fed. Reg. 34746 (1983), *Erratum*, 48 Fed. Reg. 37224 (1983) and 48 Fed. Reg. 44814 (1983), *Memorandum Opinion and Order*, 49 Fed. Reg. 36107 (1984) (reconsideration granted in part), *aff'd mem., Baxter v. FCC*, 774 F.2d 510 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1184 (1986).

[17] ARRL petition at 4, Gagnon petition at 2, SPAM petition at 4.

[18] SPAM estimates that its members own 1,400 1 kW AM transmitters in operation today. SPAM petition at 5. Gagnon cites the growth in SPAM membership from 362 in 1983 to over 1,000 in 1990. Gagnon also states that there is no commercial incentive for a new manufacturer to start producing these transmitters and that most commercial AM kilowatt transmitters still in existence have been restored and placed back in service. Gagnon petition at 3-4.

[19] *See* note 16, *supra*.

[20] *See* Baxter v. FCC, No. 84-1504, mem. at 2.

[21] *Id.* at 2-3.

[22] *Id.* at 4.

[23] *Report and Order* at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: October 31, 1990

LINCOLN TELEPHONE AND TELEGRAPH COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

Lincoln Telephone and Telegraph Company filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs for the quarter ended September 30, 1990. Parties may file comments on the proposed revisions to the cost manual no later than **November 29, 1990.** Replies should be filed by **December 14, 1990.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: October 31, 1990

FCC ANNOUNCES 1991 MAXIMUM REIMBURSEMENT FEE FOR AN AMATEUR OPERATOR LICENSE EXAMINATION

The FCC announced today that effective January 1, 1991, the maximum allowable reimbursement fee for an amateur operator license examination will be $5.27. This amount is based upon a 6.2% increase in the Department of Labor Consumer Price Index between September 1989 and September 1990.

Volunteer examiners (VEs) and volunteer-examiner coordinators (VECs) may charge examinees for out-of-pocket expenses incurred in preparing, processing, or administering examinations for Technician, General, Advanced, and Amateur Extra Class operator licenses. The amount of any such reimbursement fee from any examinee for any one examination session, regardless of the number of elements administered, must not exceed the maximum allowable fee. Where the VEs and the VEC both desire reimbursement, they jointly decide upon a fair distribution of the fee.

No fee is allowed for the Novice Class operator license examination.

This announcement is made pursuant to Section 97.527 of the Commission's Rules, 47 C.F.R. § 97.527.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: October 24, 1990

EMERGENCY VESSEL LOCATION SYSTEM REQUESTS THAT A SYNTHESIZED VOICE USED FOR EMERGENCY MESSAGES BE INTERPRETED AS COMPLYING WITH PART 80 OF THE COMMISSION RULES

On September 28, 1990, Robert Tendler filed a *Request for Issuance of Declaratory Ruling* requesting that the Commission interpret Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to include a synthesized voice as appropriate for emergency voice messages. In his request, Mr. Tendler suggests that, pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and relevant Circuit Court decisions, a declaratory ruling is appropriate when the Commission interprets an existing rule. Here, Mr. Tendler argues that because the Commission's Rules do not explicitly determine the acceptability of a synthesized voice, the matter is left to interpretation by the Commission. Thus, Mr. Tendler seeks a Commission declaratory ruling that interprets Part 80 to allow for a synthesized voice for emergency messages.

The Private Radio Bureau seeks comment on this issue. To file comments, please file an original and two copies at the following address: Chief, Special Services Division, Federal Communications Commisssion, 2025 M Street, N.W., Room 5322, Washington, D.C. 20554. Comments should be filed by December 31, 1990. Reply Comments should be filed by January 15, 1991. Comments and reply comments should refer to: Emergency Vessel Location System Declaratory Ruling Request.

Copies of Emergency Vessel Location System's *Request for Issuance of Declaratory Ruling*, as well as any documents filed in this matter, may be obtained from the Commisssion's copy contractor, International Transcription Services, Inc., at the following address and telephone number: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. These documents may also be inspected at Room 5322, noted above.

For further information, please contact Susan Jones at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PALMETTO
BROADCASTERS
ASSOCIATED FOR
COMMUNITIES, INC.
(Assignor)

and BALET-900508KE

JACKSONVILLE
EDUCATORS
BROADCASTING, INC.
(Assignee)

For Assignment of License of
Television Station WETV
Key West, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1990; Released: October 18, 1990

By the Commission:

1. On February 16, 1990, the President signed into law the Television Broadcasting to Cuba Act (Act).[1] The Act, *inter alia*, directs the Commission to assign a "suitable frequency" for the purpose of broadcasting television programming to Cuba. This programming is to provide "news, commentary, and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba," and is deemed by the Act to be in the national interest. These broadcasts are to be known as the Television Marti Service (TV Marti).

2. A comprehensive study begun in 1988 by a special TV Marti Task Force concluded that television Channel 13 is the only suitable channel for television broadcasting to Cuba, based on considerations of VHF television usage in Florida and Cuba and the virtual absence of UHF receivers in Cuba. The Task Force was an intragovernmental group which included representatives of the United States Information Agency (USIA), the Voice of America (VOA), the National Telecommunications and Information Administration (NTIA), the Electromagnetic Compatibility Analysis Center of the Department of Defense, and the Federal Communications Commission. Briefly, the Task Force concluded that the use of any channel from 2 through 12 to broadcast from U.S. territory to Havana would either cause interference to an authorized service, would receive unacceptable interference, or both. A reconfiguration of established domestic service on those channels so as to avoid causing interference is not permitted because the Act prohibits reassignment of a licensee if that licensee was broadcasting a television signal as of January 1, 1989. Sections 243(d)(1) and (2), and Section 248(2) of the Act. Section 243(d)(2) does not apply to the licensee of Channel 13, Key West, Florida, which did not begin operating until the summer of 1989.

3. On March 25, 1990, test broadcasts to Cuba were begun on Channel 13 from government facilities on the Florida Keys. The test broadcasts were conducted under authority of an experimental license issued by NTIA with Commission concurrence pursuant to a time sharing agreement between the USIA and Palmetto Broadcasters Associated for Communities, Inc. (Palmetto), the licensee of a noncommercial educational television station serving Key West, Florida on Channel 13.

4. The Act defers obligation or expenditure of funds authorized to the USIA for TV Marti until the President determines that the test of television broadcasting to Cuba is feasible and will not cause objectionable interference to the broadcasts of domestic licenses. On August 26, 1990, the President made such a determination and further determined that TV Marti shall continue television broadcasting to Cuba. On August 28, 1990, the Commission granted USIA a temporary authorization to continue operating on Channel 13 on a time-sharing basis mutually agreeable to the USIA and Palmetto. This temporary authorization expires on November 30, 1990, or upon issuance of a permanent allocation, whichever occurs first. On September 27, 1990, VOA formally requested the assignment of Channel 13 to the TV Marti Service.

5. Palmetto had entered into an asset purchase agreement on April 13, 1990 with Jacksonville Educators Broadcasting, Inc. for the sale of Channel 13. On May 8, 1990, the parties filed the application for assignment of license before us here.

6. Section 243(d)(1) of the Act affords the Commission no discretion. It states that "the Federal Communications Commission shall assign by order a suitable frequency to further the national interests expressed in this part, except that no such assignment shall result in objectionable interference with the broadcasts of any domestic license." As discussed above, the Commission has determined that Channel 13 is the only suitable frequency to fulfill the mandate of the Act. In order for the Commission to comply with Congress' directive, we must ensure that Channel 13 is available for the exclusive use of the Television Marti Service. The interests of the parties to the sale, therefore, are subordinate to the statutory mandate. *See Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984). Further, it would serve no practical purpose to approve the pending assignment for Channel 13, only to reclaim the channel shortly thereafter pursuant to the statute. Consequently, in accordance with this legislative mandate to "further the national interest," the pending assignment application will be dismissed.[2]

7. Accordingly, IT IS ORDERED, That the application for assignment of the license of television broadcast station WETV, Key West, Florida, from Palmetto Broadcasters Associated for Communities, Inc. to Jacksonville Educators Broadcasting, Inc., (BALET-900508KE), IS HEREBY DISMISSED, effective on the date of adoption, October 17, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] This Act, Title II, Part D, Sec. 241, is contained in the *Foreign Relations Authorization Act*, Fiscal Years 1990 and 1991, Pub. L. No. 101-246 (signed February 16, 1990).

[2] By separate action we shall assign Channel 13 to USIA.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC.

File No. I-T-C-90-131

Application for authority to reroute and add domestic facilities in Hawaii.

ORDER AND AUTHORIZATION

Adopted: October 1, 1990; Released: October 31, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed by GTE Hawaiian Telephone Co., Inc. (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to add and reroute circuits connecting Honolulu Toll Test with various international points via the cable stations at Makaha and Keawaulu and to provide circuits between the multipurpose earth station facilities at Ewa and Ko'Olina for alternate routing purposes. Upon consideration of the application, we find that grant of the application is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-131 IS GRANTED, and HTC is authorized to:

a. remove 75 L-carrier circuits between Honolulu Toll Test and the Makaha Cable Station via Keawaula, and place 165 circuits on fiber optic facilities between Ko'Olina and Makaha to provide a net gain of 90 circuits between Honolulu Toll Test and the Makaha Cable Station;

b. remove the 138 L-carrier circuits between the Makaha Cable Station and the Keawaula Cable Station and place 138 circuits on fiber optic facilities from Ko'Olina to the Keawaula cable station in order to reroute the channels from a) Honolulu Toll Test to Keawaula via a combination of the analog microwave radio system between Honolulu and Makaha and the L-carrier system between Makaha and Keawaula; and b) Makaha to Keawaula via the L-carrier system; and

c. Place 147 circuits on fiber optic facilities between the multipurpose earth station facility (MPF) at Ewa and the Makaha Cable Station via Ko'Olina to provide alternate routing.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-011-LA

Application for authority to participate in the launch of the INMARSAT-II (F-1)

ORDER AND AUTHORIZATION

Adopted: October 24, 1990; Released: October 31, 1990

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-011-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987, updated on September 19 and supplemented on October 23, 1990, for authority to participate in the launch and in-orbit testing of the modified INMARSAT-II (F-1) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received.

3. The INMARSAT-II (F-1) was shipped from the manufacturer's test facility in Toulouse, France by air transport and arrived at the launch site in Florida in early August 1990, and is scheduled to be launched on October 30, 1990, utilizing a Delta II commercial launch vehicle. This satellite will replace the INTELSAT V (F-6) MCS-A limited capacity maritime package located at 62.8^0 East Longitude and will be drifted to its operating position of 64.5^0 East Longitude in the Indian Ocean Region (IOR). It is anticipated that the INMARSAT-II (F-1) will be in service by the end of November 1990.

4. The estimated costs associated with the INMARSAT-II (F-1) are as follows (all amounts in real year dollars):

BAe Contract (including delivery price, engineering changes and amendments, launch support and performance incentives)	$ 79.6 million
Delta Launch Vehicle and Services	$ 49.0 million
Insurance	$ 6.0 million
TOTAL INMARSAT	$134.6 million
TOTAL COMSAT (based on current ownership share of 24.987%)	$ 33.6 million

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INMARSAT-II (F-1) satellite to be positioned at 64.5^0 East Longitude over the IOR, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INMARSAT-II (F-1) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HARRISCOPE OF CHICAGO, INC. *et al.*
A Joint Venture
d/b/a VIDEO 44

MM DOCKET NO. 83-575
File No. BRCT-820802J9

For Renewal of License of
Station WSNS-TV, Channel 44
Chicago, Illinois

and

MONROE COMMUNICATIONS CORPORATION

MM DOCKET NO. 83-576
FILE NO. BPCT-821101KH

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 1990; Released: October 31, 1990

By the Commission: Commissioner Quello concurring and issuing a statement.

I. BACKGROUND

1. This proceeding involves the application of Video 44 for renewal of its license to operate station WSNS-TV in Chicago, Illinois, and the mutually exclusive application of Monroe Communications Corporation for a construction permit. On January 31, 1989, the Commission issued a memorandum opinion and order upholding a decision by the Review Board granting Video's application and denying Monroe's. *Video 44*, 4 FCC Rcd 1209 (1989), *denying review of* 3 FCC Rcd 3587 (Rev. Bd. 1988).

2. The Commission found that Video had established that its performance during the 1979-82 license term was substantial and therefore deserving of a renewal expectancy preference to be taken into account in the comparative analysis. *See generally Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). The Commission made this finding although Video had reduced the amount of its nonentertainment programming during the course of the license term, in connection with its institution of almost full-time subscription television (STV) operation.[1] The Commission held that Video's renewal expectancy outweighed Monroe's preferences for integration of ownership into management and diversification of media control. 4 FCC Rcd at 1212 ¶¶ 25-29, 1213 ¶¶ 38-44.

3. Additionally, the Commission declined to consider allegations that during STV operation WSNS-TV had presented obscene movies in violation of 18 U.S.C. § 1464. The Commission held that it would not consider such allegations in the absence of adequate contemporaneous complaints. 4 FCC Rcd at 1213 ¶¶ 36-37. *See also Video 44*, 3 FCC Rcd 757, 759-60 ¶¶ 15-24 (1988).

4. On April 10, 1990, the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings. *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990). The court faulted the Commission for not giving sufficient attention to the downward trend in WSNS-TV's performance during the license term in deciding whether Video was entitled to a renewal expectancy. The court also held that the Commission had acted arbitrarily in failing to consider the merits of the allegations that WSNS-TV had presented obscene programming.

5. The parties were requested to submit comments as to what action would be appropriate on remand. *Video 44*, FCC 90I-36 (May 4, 1990). Video, Monroe, and the Mass Media Bureau filed comments on June 28, 1990 and reply comments on July 11, 1990. Upon examination of their comments and the record in light of the court's remand order, we conclude that Monroe's application should be granted and Video's denied. We now find that Video's performance during the 1979-82 license term does not warrant a renewal expectancy. Consequently, Monroe's unchallenged superiority for integration and diversification proves decisive. In view of the foregoing, we do not reach the obscenity issue.

II. RENEWAL EXPECTANCY

6. During the license term extending from December 1, 1979 to November 30, 1982, WSNS-TV's operations were converted in stages from conventional programming to nearly full-time STV programming. 4 FCC Rcd at 1210 ¶¶ 7-13. By August 1982, STV programming accounted for 163 hours a week, leaving only five hours a week for conventional programming (weekdays 6:00 to 7:00 a.m.). The conversion from conventional broadcast operation to STV operation resulted in a reduction in the amount of nonentertainment programming presented by the station. Thus, for the license term as a whole WSNS-TV presented 0.92 percent news, 2.44 percent public affairs, 14.10 percent other nonentertainment programming, and 4.37 percent local programming. During the last year of the term, however, WSNS-TV presented 0.08 percent news, 2.57 percent public affairs, 5.84 percent other nonentertainment programming, and 0.89 percent local programming. *Video 44*, 102 FCC 2d 419, 446-49 ¶¶ 56-59 (I.D. 1985).

7. By August 1982, near the end of the license term, WSNS-TV cancelled most of its nonentertainment programming, including all news and local programming. Typically, in this latter part of the term, the station presented (during the 6:00 to 7:00 a.m. time period) the public affairs shows *Health Field*, produced by NBC, *Illinois Press*, produced by the University of Illinois, and a nonentertainment program called *Out and About*, produced by the University of Southern Illinois. The station also presented miscellaneous programs and PSAs.

8. The Commission found that Video's entitlement to a renewal expectancy should be evaluated based on the license term as a whole. 4 FCC Rcd at 1211-12 ¶¶ 20-29.

We observed that, with the exception of its eventual conversion to STV operation late in the license term, there was no real controversy that WSNS-TV's performance was substantial. Although we held that a trend in performance might be most probative of a licensee's performance, we did not believe that Video's conversion to STV should be given dispositive weight here. We found that: (1) Video's pre-conversion performance had been substantial; (2) even after converting to STV, Video made some effort, although reduced, to meet its programming obligations; and (3) STV is a commercially risky and uncertain service and circumstances may affect an operator's ability to provide optimal service in the STV mode during an initial start-up period. We did, however, diminish Video's renewal expectancy in view of its late-term performance.

9. The Court of Appeals rejected the Commission's analysis. 900 F.2d at 355-56. The court held that where a licensee has instituted a dramatic and apparently permanent format change, its programming following that change is more probative of its likely future performance than its prior programming. Because the Commission had no basis for considering WSNS-TV's conversion to almost full-time STV operation other than permanent, the court ruled that the Commission should have focused on WSNS-TV's performance after the conversion. The court questioned whether Video could receive a renewal expectancy based on its end of license term performance.

10. In their comments, Monroe and the Bureau argue that the court's directive indicates that WSNS-TV should receive no renewal expectancy. These parties assert that the downward trend in the station's perfomance as a result of its conversion to STV operation precludes awarding a renewal expectancy, because the station's post-conversion programming cannot be regarded as substantial. These parties further observe that in the absence of a renewal expectancy Monroe's advantages for integration of ownership into management and diversification of media control are dispositive. *See* 4 FCC Rcd at 1213 ¶¶ 38-44.

11. Video presents no basis for finding that its post-conversion programming should be considered substantial under the usual standards for evaluating a broadcaster's entitlement to a renewal expectancy.[2] Moreover, Video gives us no basis to question our prior conclusion that during the 1979-82 license term the prevailing policy treated the programming responsibilities of STV operators as being essentially the same as those of conventional broadcasters. *See Video 44*, 103 FCC 2d 1204, 1207-08 ¶ 7 (1986). Video, however, points out that on February 17, 1987, the Commission significantly revised its treatment of STV operators. *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988) (1987 STV order). *See also Subscription Video Services*, FCC 85-538 (Jan. 8, 1986), 51 Fed. Reg. 1817 (Jan. 15, 1986) (NPRM). Under the new policy, the Commission no longer classifies STV operation as a form of broadcasting and instead treats STV operation as a nonbroadcast point-to-multipoint service. Thus, an STV operator is no longer subject to all of the programming responsibilities of a broadcaster.

12. According to Video the Commission should take into consideration its reclassification of STV in evaluating Video's post-conversion programming, since this reclassification represents the Commission's current, most well-considered interpretation of the Communications Act. [3] Video contends that under cases such as *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), it would be appropriate to apply the 1987 STV order retroactively to the 1979-82 license term. This is especially so, argues Video, because the Commission's expectations of STV operators at the time were unclear and contradictory.[4] Video suggests that, pursuant to the 1987 STV order, the reduction of WSNS-TV's non-entertainment programming following its conversion to STV operation would not undermine its entitlement to a renewal expectancy. In Video's view, this is so because with respect to point-to-multipoint service the Commission relies on the contractual relationship between the operator and the subscriber rather than the government review of program content to ensure service in the public interest.

13. Monroe and the Bureau respond that the 1987 STV order should not be applied retroactively to this proceeding. They point out that cases such as *Bowen v. Georgetown University Hospital*, 109 S.Ct. 468 (1988), disfavor the retroactive application of administrative rules.[5] The Bureau points out that the Commission did not explicitly make the 1987 STV order applicable to pending cases, as it did with respect to some other policy changes.[6] The parties also maintain that, in remanding this case, the Court of Appeals apparently approved the use of the conventional broadcast standard in the decisions below, despite the 1987 STV reclassification.

14. We agree with Monroe and the Bureau that the 1987 reclassification of STV has no impact on the resolution of this case. Assuming that the Commission has the authority to apply the 1987 STV order retroactively, we nonetheless decline to do so. In this regard, our paramount concern is that we not undermine the policy underlying the granting of a renewal expectancy.

15. As we noted in our previous memorandum opinion and order in this proceeding, two factors undergirding the rationale for the renewal expectancy are relevant here. 4 FCC Rcd at 1211 ¶¶ 23-24. First, we are concerned that a challenger's paper proposal might not match the incumbent's established performance when actually executed. That is, we take into account the predictive value of the incumbent's present performance (relative to the challenger's likely future performance).[7] To the extent that we are concerned about the public interest impact of WSNS-TV's predicted *future* performance (*i.e.*, assuming the continuation of its late-term STV format), an argument can be made that we ought to look to our *current* views on STV for guidance, since they represent the views that will apply to performance in the forseeable future.[8]

16. However, a second reason for the renewal expectancy is that we desire to encourage investments in quality service by rewarding such service with a likelihood of renewal. For the renewal expectancy to function as an incentive, it must be awarded taking into consideration the standards under which the licensee was accountable at the time its performance occurred. This aspect of the renewal expectancy is thus roughly analogous to the principle that a licensee is accountable for a past regulation at the time when it was in effect even if the regulation is later modified or eliminated. *See Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500, 1510 ¶ 32 (1986), *recon. denied*, 2 FCC Rcd 3474 (1987); *Deregulation of Radio*, 84 FCC 2d 968, 1013 ¶ 115 (1981), *recon. granted in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

17. This second factor strongly militates against applying the 1987 STV order in a way that reduces Video's accountability for its past performance as measured by the standards of which Video had notice at the time. This is so because the incentive effect of the renewal expectancy depends on the licensee's perception of its need to meet the programming responsibilities in effect at the time the licensee compiles its programming record.

18. In our previous memorandum opinion and order, we noted that Video's late-term elimination of nonentertainment and local programming made Video's entitlement to a renewal expectancy less compelling than in the usual case even if Video's earlier (substantial) performance were taken into account. 4 FCC Rcd at 1212 ¶ 29, 1213 ¶ 44. We now hold that when we give probative weight to Video's end-of-term performance, as directed by the Court of Appeals, Video's performance is not substantial and deserving of a renewal expectancy. As the ALJ found:

> . . . WSNS-TV broadcast no news, no regular local programs, and effectively shut down its studios, telecast 4-5% non-entertainment programming and a drastically reduced PSA schedule at undesirable time periods - none in prime evening time.

102 FCC 2d at 458-59 ¶ 80. The ALJ aptly characterized this performance as a "wholesale abandonment of public service programming." *Id.* at 462 ¶ 88. *See generally* 4 FCC Rcd at 1209-10 ¶ 6 (regarding the nature of substantial programming). *See also* 900 F.2d at 356 (noting that Video's late-term performance placed it "near the bottom of the pack, relative to other Chicago stations.") Thus, we are faced with the situation in which a station has instituted a dramatic, late-term, and, on the face of this record, permanent reduction in the programming by which the Commission has traditionally evaluated renewal expectancy.[9] Under these circumstances, Video receives no renewal expectancy. Monroe's unchallenged preferences for integration and diversification therefore as set forth in our prior memorandum opinion and order give it a decisive advantage over Video and entitle it to grant of its application. *See* 4 FCC Rcd at 1213 ¶¶ 38-43.

III. OBSCENITY ISSUE

19. The Court of Appeals instructed the Commission "to either consider the evidence of obscene broadcasts by Video 44 that was offered by Monroe and that appeared in some contemporaneous citizen complaints, or to better justify its refusal to do so." 900 F.2d at 359. However the parties all agree that no further examination of the obscenity issue is required in this case. Video argued that "[n]o further examination of the 'evidence' advanced by Monroe of obscene programming is warranted" and "no further 'consideration' of the citizen complaint cited by the Court of Appeals is required." Comments of Video 44 at 10, 14. Similarly, both Monroe and the Bureau took the position that "[i]f the threshold question of renewal expectancy is resolved [against the incumbent], no further need would remain for consideration of . . . Video 44's allegedly obscene programming." Comments of Monroe Communications Corporation at 8; Mass Media Bureau's Comments Pursuant to Commission Order at 5. We agree. It would be a waste of resources, for both the Commission and the parties, to embark on further proceedings on this issue where not required for the outcome of the case.

IV. ORDERS

20. ACCORDINGLY IT IS ORDERED, That the Commission's memorandum opinion and order, FCC 89-4 (Jan. 31, 1989) (4 FCC Rcd 1209 (1989)) IS REVERSED, as indicated herein.

21. IT IS FURTHER ORDERED, That the application of Monroe Communications Corporation for a construction permit (File No. BPCT-821101KH) IS GRANTED, and the application of Video 44 for renewal of license of WSNS-TV, Chicago, Illinois (File No. BRCT-820802J9) IS DENIED.

22. IT IS FURTHER ORDERED, That Video 44 IS AUTHORIZED to continue operation of station WSNS-TV until 12:01 a.m. of the ninety-first (91st) day following the release of this order to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our order, it IS AUTHORIZED to continue to operate the station until 12:01 a.m. of the ninety-first (91st) following the release of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate; provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the licensee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of renewal, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In the STV mode, the signal is scrambled so that only paying subscribers supplied with a decoder can receive the programming.

[2] Video suggests that it should be permitted to supplement the record regarding its late-term programming because it could not have anticipated that this part of its performance would be given dispositive weight. Video, however, was on notice that all aspects of its record were relevant to determining its entitlement to a renewal expectancy and had ample opportunity to present whatever evidence it believed might be favorable to its cause. Additionally, Video provides no indication of how any further evidence would materially alter the analysis of its performance.

[3] Video also argues that the Commission should order further briefing of the issues of (1) whether the 1987 STV order is applicable to this case, (2) whether Video is entitled to a renewal expectancy assuming the applicablity of the 1987 STV order, and (3) whether further evidentiary hearings should be conducted in this case. We intended, however, that the com-

ments now before us would be sufficient to adequately ventilate such questions, and our examination of the comments indicates that these matters have been fully developed. Thus, the renewal expectancy issue is ripe for decision based on the pleadings before us.

[4] Hence, Video asserts that, on the one hand, the Commission expected STV operators to present nonentertainment programming, while, on the other hand, the Commission expected STV to be viable based on its ability to satisfy consumer demand, which made presenting substantial amounts of nonentertainment programming financially impractical. Video claims that it made a good faith effort to comply with these conflicting directives. As noted above, however, the Commission found that an STV operator's programming responsibilities had been clearly stated in the pertinent Commission directives. *See* 103 FCC 2d at 1207-08 ¶ 7. Here, Video substantially reduced its public service programming in August 1982, even though the Commission, in June 1982, ruled that " . . . an STV licensee will be expected to continue to meet its obligation to program in response to community needs. No reasons were offered by commenters or are evident to us to indicate that STV and conventional licensees have different obligations in this area." *Subscription TV Service*, 90 FCC 2d 341, 353 ¶ 33 (1982).

[5] In particular, Monroe disputes Video's claim that the reclassification of STV served to correct an erroneous interpretation of the definition of broadcasting in the Communications Act, which, as a correction should be applied retroactively. *See* 47 U.S.C. § 153(o). Rather, Monroe maintains that the reclassification of STV represents a prospective exercise of administrative discretion. Monroe's position finds support in *National Association for Better Broadcasting v. FCC*, 849 F.2d at 668-69 (affirming the 1987 STV order).

[6] Video filed a petition for reconsideration of the 1987 STV order asking the Commission to declare that the order had retroactive effect. The Commission dismissed Video's petition as moot after Video was awarded a renewal expectancy using the conventional broadcast standard. *Subscription Video Services*, 4 FCC Rcd 4948, 4948-49 ¶¶ 7-8 (1989). Monroe faults Video for not raising the retroactivity question earlier in the present comparative renewal proceeding.

[7] In remanding this case, the Court of Appeals held that the Commission had given insufficient weight to the extent that the Commission's treatment of WSNS-TV's past record undermined this factor. 900 F.2d at 355-56.

[8] Similarly, in *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943), and *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981), changes in law occurring during the pendency of a proceeding governed the applicant's future eligibility to hold a license or permit.

[9] As we noted in our previous memorandum opinion and order in this proceeding: "[i]t is unlikely that cases such as this...will arise in the future." 4 FCC Rcd at 1214 n.4.

Concurring Statement
of
Commissioner James H. Quello

Harriscope of Chicago, Inc. and Monroe Communications Corporation, MM Docket Nos. 83-575 and 83-576.

I concur in this decision because of the unusual facts presented by this case and in deference to the Court of Appeals order that we focus on the end of Video 44's license term. But I am writing separately to emphasize that the Commission's decision in no way represents an abandonment of the renewal expectancy for traditional broadcast licensees.

This case turns on whether the record of WSNS should be evaluated by the renewal standard for traditional licensees or by a different standard for subscription television. But the Commission did not reclassify subscription television as a nonbroadcast service until 1987 -- five years after the end of the license term under review. For me, then, the important question is whether Video 44 was on notice that it was required to live up to our traditional public interest requirements. The answer is contained in the Commission's *Third Report and Order, Subscription TV Service*, where we concluded that STV and conventional broadcasters have the same obligation to provide programming "in response to community needs." 90 F.C.C.2d 341, 353-54 (1982). Nevertheless, within two months of the *Third Report and Order*, Video 44 eliminated most of its nonentertainment programming on WSNS and cut back to *zero* news and *zero* local programming. Once we focus on this period in the license term, as the Court says we must, it is hard to justify a renewal expectancy for Video 44.

Although today's decision has serious repercussions for Video 44, it will have minimal precedential value, if any. The ultimate question here is whether a pure subscription television operator could gain a renewal expectancy under the standard applicable to traditional broadcasters. Since no licensees are currently providing STV service, I do not expect the Commission's answer to be particularly relevant to future renewal contests.

I also agree with the Commission's decision to forego consideration of the obscenity issue. It would be unwise for us to initiate the type of extensive proceedings that would be constitutionally required for an obscenity determination where it is unnecessary to the outcome of the case. The Court of Appeals has held that the Commission must "adopt, in its deliberations leading to any substantive determination of obscenity, approaches that provide, as nearly as possible, the functional equivalent of a jury determination of a clear community consensus that the material is lewd and offensive." *Illinois Citizen's Committee for Broadcasting v. FCC*, 515 F.2d 397, 406-07 (D.C. Cir 1975) (supplement to opinion). Such a proceeding would be far more cumbersome than the type of deliberation that goes into the Commission's indecency decisions, and, fortunately, is unnecessary to decide this case. Accordingly, I concur with the Commission's resolution of the issues before us.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 61 of the Commission's Rules — RM-7481

ORDER

Adopted: October 18, 1990; Released: October 19, 1990

By the Chief, Common Carrier Bureau:

1. On August 1, 1990, Consumer Federation of America, International Communications Association, and National Association of State Utility Consumer Advocates, jointly filed a petition for expedited Rule Making to revise Part 61 of the Commission's Rules to require carriers subject to price cap regulation to submit specific supporting information used in the calculation of their Price Cap Indexes and Actual Price Indexes.

2. On October 12, 1990, American Telephone and Telegraph Company (AT&T) filed an opposition to the petition for expedited Rule Making, together with a motion to accept its late-filed pleading and to modify the period for filing reply comments in this proceeding. AT&T claims that due to an oversight, it did not become aware until October 5, 1990, that the Commission's Rule Making process on the petition had been initiated. In order to avoid disadvantaging other participants in the proceeding by the acceptance of its late filing, AT&T requests that the Commission extend the period for filing reply comments until 15 days from the date of its October 12, 1990 filing. AT&T further argues that such an extension will allow other parties to reply both to the comments previously filed and to AT&T's comments in a single, consolidated pleading.

3. We have reviewed AT&T's motion to accept a late-filed pleading and its request to modify the period for filing reply comments in the above-captioned proceeding. We do not believe that any party would be disadvantaged by our acceptance of AT&T's late-filed pleading, especially since it is coupled with a modification of the pleading deadline for replies. Therefore, we have decided to grant both of AT&T's requests.

4. Accordingly, IT IS ORDERED that the motion to accept the late-filed pleading filed by American Telephone and Telegraph Company IS GRANTED.

5. IT IS FURTHER ORDERED that the time for filing reply comments in this proceeding IS EXTENDED until October 29, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Transmittal No. 378
Telephone Companies
Tariff F.C.C. No. 1

ORDER

Adopted: October 19, 1990; Released: October 19, 1990

By the Chief, Common Carrier Bureau:

1. The Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 378 on July 10, 1990, to establish an offering called "Shared Network Arrangement" (SNA), to allow for split ordering and billing of special access high capacity DS1 and DS3 service. On July 25, 1990, the Association for Local Telecommunications Services (ALTS) filed a petition to suspend and investigate Transmittal 378, to which Bell Atlantic replied. Transmittal 378 is scheduled to become effective October 22, 1990.

2. Under SNA, a "host customer" would order and pay for DS1 or DS3 service from its premises to the hub (*i.e.*, a central office equipped with multiplexing equipment). One or more customers, called "service users," would connect voice grade or DS1 channels from their premises to the host customer's DS1 or DS3 line via a multiplexer at the hub. Service customers would pay for the voice grade or DS1 channel termination, any applicable mileage charges, and a nonrecurring SNA charge. At the same time, the host customer would pay for a DS1 or DS3 termination from the hub to its premises, any applicable mileage charge, and the multiplexing that allows the host to carry the service user's traffic. Bell Atlantic Tr. 378, Description and Justification at 1-1 through 1-3. Bell Atlantic asserts that it filed Transmittal 378 in response to increasing requests that it bill end users directly for their portion of the shared network. *Id.*

3. ALTS asserts that the service user customer who wishes to access DS1 or DS3 services offered by Bell Atlantic's local service competitors must buy two connecting circuits, whereas under SNA those customers need only purchase one circuit to connect with Bell Atlantic's high capacity circuit. ALTS Petition at 2. Therefore, ALTS argues, Bell Atlantic maintains an unfair advantage over its competitors due to the lack of adequate central office interconnection available to those competitors. *Id.* According to ALTS, adequate interconnection would allow Bell Atlantic's competitors to offer their customers the same sharing arrangement Bell Atlantic proposes in Transmittal 378. *Id.* at 3. ALTS contends that at least one Bell Atlantic competitor has unsuccessfully requested such interconnection. *Id.* ALTS further claims that Bell Atlantic's SNA rate is based, in part, on a projection of costs based on a 24-minute time period for processing service requests. Other Bell Atlantic customers, says ALTS, will subsidize these costs to the extent that service requests take longer than 24 minutes to process. *Id.* at 4 n.4.

4. Bell Atlantic states that Transmittal 378 would allow the end links of a multiplexed circuit to be ordered by and billed to a different customer from the customer for the underlying high capacity service, an arrangement that is essentially identical to a service currently offered by BellSouth. Bell Atlantic Reply at 2. Bell Atlantic rebuts the ALTS contention that only one termination charge is assessed under Transmittal 378, noting that two channel terminations are required for every circuit -- one charged to the host customer for the DS1 or DS3 termination, and a second channel termination charged to the service user for the lower speed end link. *Id.* at 3.

5. The Common Carrier Bureau has reviewed Transmittal 378, the description and justification supporting it, and the various pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by Bell Atlantic raise questions of lawfulness that warrant suspension or investigation of Transmittal 378.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 378, filed by the Association for Local Telecommunications Services IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 24, 1990

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

PROCEDURES FOR FILING APPLICATIONS FOR FREQUENCIES IN THE 470-512 MHz BANDS

CC Docket No. 87-120

By Commission Order released August 12, 1989, the staff was directed to issue a public notice announcing the dates on which it would accept applications for the reassigned multiple address control frequencies. This notice sets forth the dates of the initial 3-day filing window and provides additional guidance to persons preparing applications for authorization for these frequencies.

Filing Period: January 28, 1991 through February 8, 1991, inclusive.

Fee Amount: The filing fee for 470-512 MHz multiple address control frequency applications is *$230 per transmitter*. This is in conformance with the fee schedule for applications in the Public Land Mobile Service. The fee will be calculated based upon the number of transmitters requested in the attached FCC Form 401 and schedule B(s) attached. Multiples should be calculated on FCC Form 155. A minimum filing fee of $230 is required with each application. These applications should be submitted on FCC Form 401 together with the appropriate filing fee and a completed FCC Form 155 to: Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, Pennsylvania 15251-5130. Applications may also be hand delivered to Federal Communications Commission, c/o Mellon Bank, Three Mellon Bank Center, 525 William Penn Way, 27th Floor, Room 153/2713, Pittsburgh, Pennsylvania, Attention: Wholesale Lockbox Shift Supervisor. Applications must be accompanied by the appropriate filing fee for Code CMD public land mobile service applications in accordance with the procedures set forth in Section 1.1101 of the rules, 47 CFR §1.1101, *et seq.*

Finally, as stated in Footnote 1, in the Order on Reconsideration, Second Report and Order (Part 1), there is an outstanding petition for reconsideration of the allocation in the New York City/Northeastern New Jersey area. Accordingly, no applications should be filed at this time for the New York City/Northeastern New Jersey market. A subsequent public notice will be issued announcing filing procedures for this market.

For further information contact Sam Gumbert, Telephone No. (202) 632-0914 and the Fee Hotline, (202) 632-FEES.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-493

In the Matter of

Amendment of Section 73.202(b), RM-7429
Table of Allotments,
FM Broadcast Stations.
(Pine Bluff and Maumelle, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Southern Starr of Arkansas, Inc. (petitioner), licensee of Station KOLL-FM, Channel 235C, Pine Bluff, Arkansas, seeking amendment of the FM Table of Allotments to reallot Channel 235C to Maumelle, Arkansas, as its first local service, and modification of its license accordingly.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner advises that the requested change to Maumelle is mutually exclusive with the present allotment of Channel 235C at Pine Bluff, since it does not intend to move from its present transmitter site.[2] Further, petitioner states that, operating from its present site with existing facilities, Station KOLL-FM places a 70 dBu signal over the entire community of Maumelle. Petitioner adds that Pine Bluff (pop. 56,636) [3] presently has four FM stations[4] and five AM stations,[5] whereas Maumelle (pop. 5,704)[6] has a vacant FM allotment only.[7] Thus, petitioner claims that its proposal would not deprive Pine Bluff of local service, and would result in a preferential arrangement of allotments under the Commission's allotment scheme by providing Maumelle with its first local FM service.

3. A staff engineering review of the proposal reveals that Channel 235C can be allotted to Maumelle consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[8]

4. In consideration of the above, we believe the public interest would be served by proposing to reallocate Channel 235C from Pine Bluff to Maumelle, as that community's first locally operative FM service. Therefore, as requested, we shall propose to modify Station KOLL-FM, as requested, to specify Maumelle as its community of license. In accordance with the provisions of Sections 1.420(g) and (i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 235C at Maumelle, nor require that the petitioner demonstrate the availability of an additional equivalent channel at that community.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Maumelle, Arkansas	245A	235C,245A
Pine Bluff, Arkansas	222C1,235C 257A,267A	222C1,257A, 267C3[9]

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Ashton R. Hardy, Esq.
Bradford D. Carey, Esq.
Marjorie R. Esman, Esq.
Walker, Bordelon, Hamlin,
Theriot and Hardy
701 South Peters Street
New Orleans, LA 70130

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order,* MM Docket No. 88-526, 54 FR 26199, June 22, 1989; *recon. pend.*

[2] Coordinates at the licensed site of Station KOLL-FM are 34-26-31 and 92-13-03.

[3] Population figures were taken from the 1980 U.S. Census.

[4] Stations KIPR, KOLL-FM, KZYP and KPBQ-FM.

[5] AM Stations KPBA, KCAT, KCLA, KOTN and KYDE are also licensed to Pine Bluff.

[6] The population figure was provided by petitioner, and is based on a special census count of Maumelle as a result of its incorporation in 1985.

[7] Petitioner notes that although Channel 245A is allotted to Maumelle, and that an application filed by Sonrise Management Services, Inc. on behalf of Lake Maumelle FM Limited Partnership (File No. BPH-871109MG), is pending for the allotment, the mere allotment at Maumelle does not constitute a local service. Rather, petitioner asserts, an existing allotment is not considered a local service until a construction permit has been granted for the frequency, citing *Santee Cooper Broadcasting Co.,* 99 FCC 2d 781 (Rev. Bd. 1984) and *Baker v. FCC,* 834 F.2d 181 (D.C. Cir. 1987).

[8] Coordinates used in this determination are those at the licensed site of Station KOLL-FM at 34-26-31 and 92-13-03.

[9] A separate proceeding is pending before the Commission to substitute Channel 267C3 for Channel 267A at Pine Bluff. *See* MM Docket No. 90-18, 5 FCC Rcd 633 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-492

In the Matter of

Amendment of Section 73.202(b), RM-7438
Table of Allotments,
FM Broadcast Stations.
(Baldwyn, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 3, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Magnolia Communications Corp. (petitioner), requesting the substitution of FM Channel 223A for Channel 240A at Baldwyn, Mississippi, and modification of its license for Station WESE to specify operation on the new channel.

2. In support of its request, petitioner states that changing from Channel 240A to Channel 223A would allow Station WESE to increase its power from 3000 watts to 6000 watts. Petitioner points out that at the present time it cannot increase its power on Channel 240A due to a conflict with Station WLZA, Eupora, Mississippi. According to petitioner, if its proposal is granted, Station WESE will provide greater coverage to the Baldwyn area and the adjacent channel interference it currently receives would be eliminated by the channel substitution.

3. We believe petitioner's proposal warrants consideration. Channel 223A can be allotted to Baldwyn at petitioner's proposed site in compliance with the minimum distance separation requirements of the Commission's Rules.[1] We shall propose to modify the license held by Magnolia Communications Corp. to specify operation on Channel 223A.

4. In view of the above, the Commission believes the public interest would be served by proposing the channel substitution as it could provide Baldwyn and surrounding areas with improved service. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Baldwyn, Mississippi	240A	223A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James A. Koerner
Baraff, Koerner, Olender
& Hochberg, P.C.
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036-3355
(Counsel to the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 223A are 34-24-57 and 88-41-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-491

In the Matter of

Amendment of Section 73.202(b), RM-7387
Table of Allotments,
FM Broadcast Stations.
(Wisconsin Dells, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 3, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition filed by Armada Broadcasting Company, Inc. (petitioner), requesting the substitution of FM Channel 295A for Channel 296A at Wisconsin Dells, Wisconsin. Petitioner also requests the modification of its license for Station WNNO-FM, Channel 296A, to specify operation on Channel 295A. Petitioner states its intention to file an application for Channel 295A.

2. In support of its request, petitioner states its desire to take advantage of the Commission's recent rule making changing the ERP of a Class A station to six kilowatts. Petitioner further states that Station WNNO-FM is precluded from increasing power on its present frequency but could do so on Channel 295A. According to petitioner, the potential listening audience in Wisconsin Dells has increased over the past ten years and Station WNNO-FM wishes to increase its power to better serve the needs of this growing area.

3. We believe the public interest would be served by proposing the substitution of Channel 295A for Channel 296A at Wisconsin Dells and modifying the license at Wisconsin Dells to specify operation on Channel 295A. Channel 295A can be allotted to Wisconsin Dells in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[1]

4. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Wisconsin Dells, Wisconsin	296A	295A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101
(Counsel to the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 295A are 43-36-50 and 89-36-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-464

In the Matter of

Amendment of Section 73.202(b), RM-6859
Table of Allotments,
FM Broadcast Stations.
(Lynchburg, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7575 (1989), issued in response to a petition filed by CRS Communications, Inc. ("petitioner"), proposing the substitution of Channel 269C3 for Channel 269A at Lynchburg, Virginia. Petitioner also requested modification of its license for Station WXYU(FM), Channel 269A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 269C3 for Channel 269A at Lynchburg, Virginia, since it would provide the community with its first commercial, wide coverage area FM station.[1] The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules with a site restriction of 20.1 kilometers (12.5 miles) east of the community.[2] In addition, we are modifying the petitioner's license for Station WXYU(FM), Lynchburg, Virginia, to specify operation on Channel 269C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lynchburg, Virginia	252A, 261A, 269C3, 290A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WXYU(FM) Lynchburg, Virginia, IS MODIFIED to specify operation on Channel 269C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In MM Docket No. 90-366, the Commission has also proposed to substitute Channel 261C3 for Channel 261A at Lynchburg, Virginia, and to modify the license for Station WKZZ(FM) to specify operation on the higher class channel. *See Notice of Proposed Rule Making*, DA 90-1041, released August 14, 1990. The Commission also has before it the petition of Douglas Broadcasting, Inc. to substitute Channel 250C3 for Channel 252A at Lynchburg, and to modify the license for Station WGOL(FM), accordingly (RM-7431).

[2] The coordinates for Channel 269C3 are 37-25-37 and 78-55-00. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-490

In the Matter of

Amendment of Section 73.202(b), RM-7394
Table of Allotments,
FM Broadcast Stations.
(Fort Ann, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Harvest Broadcasting Services (petitioner) requesting the allotment of Channel 253A to Fort Ann, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Canadian concurrence in the allotment is required because Fort Ann is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Channel 253A can be allotted to Fort Ann in compliance with the Commission's minimum distance separation requirements with respect to all domestic allotments without the imposition of a site restriction, but would be approximately 24 kilometers short-spaced to Station CIEL-FM, Channel 253C1 at Longueuil, Quebec.[1] However, we have confirmed that there would be no prohibited overlap between Station CIEL-FM at Longueuil and a Channel 253A allotment at Fort Ann. Therefore, we will request Canadian concurrence in the allotment of Channel 253A to Fort Ann as a specially negotiated allotment.

3. We believe the public interest would be served by proposing the allotment of Channel 253A to Fort Ann, New York, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Fort Ann, New York	–	253A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brian Dodge
Harvest Broadcasting Services
RFD 3 Rt. 16N
Dover, New Hampshire 03820
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 253A at Fort Ann are North Latitude 43-24-51 and West Longitude 73-29-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-574

In the Matter of

Amendment of Section 73.202(b), RM-7068
Table of Allotments,
FM Broadcast Stations.
(Wanchese, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of WOBR, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8731 (1989), proposing the substitution of Channel 237C3 for Channel 237A at Wanchese, North Carolina, and the modification of its license for Station WOBR-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C3 for Channel 237A at Wanchese, North Carolina, since it could provide the community with a local wide coverage area FM service. Channel 237C3 can be allotted to Wanchese in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.6 kilometers (4.1 miles) northeast to avoid a short-spacing to Station WRNS-FM, Channel 236C, Kinston, North Carolina, and to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's license for Station WOBR-FM to specify operation on Channel 237C3 in lieu of its present Channel 237A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Wanchese, North Carolina	237C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of WOBR, Inc. for Station WOBR-FM, Wanchese, North Carolina, IS MODIFIED to specify operation on Channel 237C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237C3 at Wanchese are North Latitude 35-53-20 and West Longitude 75-35-20. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-593

In the Matter of

Amendment of Section 73.202(b), RM-7069
Table of Allotments,
FM Broadcast Stations.
(Piketon, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Ohio Kentucky Radio Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 4 (1990), proposing the allotment of Channel 261A to Piketon, Ohio, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 261A to Piketon since it could provide the community with its first local FM service. Channel 261A can be allotted to Piketon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment has been received since Piketon is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Piketon, Ohio	261A

4. The window period for filing applications for Channel 261A at Piketon, Ohio, will open on **December 18, 1990,** and close on **January 17, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 261A at Piketon are North Latitude 39-04-00 and West Longitude 83-00-42. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-481

Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations. RM-6910

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1990; Released: November 1, 1990

By the Commission:

I. INTRODUCTION

1. The purpose of this proceeding is to solicit comments on proposed amendments to Part 90 of the Commission's Rules, 47 C.F.R. Part 90, that govern the private land mobile radio services. In particular, we seek comment on whether our Rules and policies relating to station construction, license cancellation, and license reinstatement should be modified. We also seek comment on whether a finder's preference should be established to provide an incentive for persons who provide us information about unconstructed, unloaded, or non-operational private land mobile radio systems. Some proposals contained in this Notice relate to procedures governing all of the private land mobile frequency bands while others deal only with the bands above 470 MHz, where exclusive licenses are permitted.[1]

II. BACKGROUND/DISCUSSION

2. The Communications Act of 1934, as amended, directs this Commission to encourage the larger and more effective use of radio in the public interest.[2] We have, over the years, allocated various amounts of spectrum for broadcast, common carrier and private radio uses. This allocation has resulted in five principal frequency bands for private land mobile radio communications. [3] These frequencies are licensed to a wide variety of eligible users including governmental entities, large industrial manufacturers, small businesses, and others.[4] The demand for frequencies in the private land mobile bands has grown significantly, and, in many areas of the country, channels that are licensed on a shared basis are experiencing severe congestion. Channels that can be licensed on an exclusive basis often are unavailable. It is essential, therefore, that the channels be used in an effective and spectrum efficient manner.

3. We manage the spectrum through various licensing systems set out in Title 47 of the Code of Federal Regulations. In the private land mobile radio services, eligible users must prepare and file FCC Form 574, entitled "Application For Radio Station Authorization In The Private Radio Services". Available frequencies are assigned to applicants on a first-come, first-served basis.[5] Licenses are initially issued for five year terms and, upon application therefor, may be renewed for additional five year terms.[6] A license in the private land mobile radio services may terminate, however, if the licensee fails to meet certain requirements during the license term or neglects to take action at the end of the term to renew its license. For example, channels assigned must be constructed, placed in operation, and remain in operation to assure efficient use of scarce spectrum.

4. *Station Construction / Operation.* Our Rules require licensees to construct and place their stations in operation within prescribed time periods. Conventional land mobile radio stations, in this regard, must be constructed within eight (8) months of license grant,[7] and trunked stations must be constructed within twelve (12) months of license grant.[8] Under our interpretation of existing rules, construction of a base station alone does not satisfy these requirements. Rather, the station must both be constructed and placed in operation, which means that the licensee must also have mobile units operating on the facility. Essentially, we do not consider a base station to be operational if it does not have an associated mobile station or stations operating as well. There has been some confusion in the industry about this interpretation. We propose, therefore, to clarify our Rules to reflect this interpretation more explicitly.[9] As under existing rules, if construction is not timely completed, the authorization cancels automatically and must be returned to the Commission.[10]

5. *Continuance of Operation.* Once the station is constructed and placed in operation, the private land mobile radio licensee is required to continue to operate its facilities. Our Rules provide that if a station discontinues operation for one year or longer, which is deemed to constitute permanent discontinuance, the licensee is required to return its authorization to the Commission for cancellation, or, alternatively, to notify the Commission of its discontinued operation by filing FCC Form 405-A.[11] These requirements serve to ensure that we know that the frequencies are not in use and that they may be reassigned to another applicant.

6. The Rule governing discontinuance of station operation, like the rule regarding construction, is a condition on a station's authorization. The license is valid only as long as the station has not discontinued operation on a permanent basis, *i.e.*, for one year or more. If the licensee does not meet this condition, its license becomes null and void. The actual forwarding of the license to the Commission for cancellation is purely a ministerial function. Any other reading of the Rule would permit the licensee to hoard channels not in use but for which others may have a critical need and is in direct conflict with the intent of the Rule. The Rule, however, needs to be clarified. We propose, therefore, to clarify our Rules to state explicitly that a license cancels automatically upon discontinued operations for a period of one year or more.

7. *License Renewal / Reinstatement.* As previously observed, licenses in the private land mobile radio services are granted for a term of five years. Licensees are, therefore, required periodically to file applications seeking renewal of their station authorizations if they desire to continue operations. Private land mobile radio licensees are, in this regard, directed to file their renewal applications no more than 90 days nor less than 30 days prior to

their license expiration date.[12] If, however, a licensee fails to seek renewal, its station authorization expires on the last day of its license term.

8. In the private land mobile radio services, a licensee that fails to file for renewal may seek reinstatement of its expired authorizations if it wants to continue to operate pursuant to that license.[13] As previously indicated, land mobile radio serves a wide variety of diverse users' needs, all of whom use radio as a tool to increase their productivity. *See* note 4 *supra*. For most private land mobile users, consequently, radio is not their primary or main activity, and their knowledge of our Rules and policies governing radio use is often limited. Our license reinstatement policies were therefore developed in large measure to assure that the operating authority of these users was not terminated without affording them a reasonable time to seek reinstatement of their expired licenses.

9. Our license reinstatement policies are not specifically codified in Part 90 of the Rules but are based primarily on application processing policy. The Rules do, however, indicate that frequency coordination remains valid for six months after license expiration. 47 C.F.R. § 90.175. In addition, our instruction booklet for FCC Form 574 advises applicants that licenses that expired more than six months ago may not be reinstated. In these cases, applicants are advised that they must submit a new application, complete in every respect (including required frequency coordination), for a new license if they still want to operate the radio station.[14] Therefore, as a matter of policy, private land mobile radio licensees have six months from the date of license expiration to seek reinstatement. If a licensee does not seek reinstatement within this six month period, the station authorization is deleted from our license records and the channel is considered available for further assignment or, in other terms, unencumbered.[15]

10. The Special Industrial Radio Services Association (SIRSA) asks that we change our license reinstatement procedures to help alleviate channel shortages through faster reassignment of those frequencies encumbered by expired licenses.[16] To this end, SIRSA proposes several changes to our current license reinstatement policies and procedures that, it suggests, will make channel reassignment procedures clearer and faster, thus improving spectrum efficiency. SIRSA first proposes that the license reinstatement period be reduced from 180 days to 90 days. SIRSA then asks that frequency coordinators be permitted to recommend frequencies associated with expired licenses to new applicants 91 days after the license expiration date regardless of whether we have deleted the expired license from our records.

11. Several equipment manufacturers, trade associations and other certified frequency coordinators generally support SIRSA's proposals regarding our license reinstatement procedures.[17] These commenters suggest that providing a shorter grace period for reinstatement of an expired license would (1) make channel recovery procedures more definite and less confusing, (2) help alleviate channel shortages, (3) expedite channel reassignment, (4) facilitate the frequency coordination process, (5) provide sufficient time for our processing procedures, and (6) provide adequate protection for existing licensees. NABER, moreover, proposes that any license that has been expired for 30 days or more should have to go through a new frequency coordination prior to reinstatement.[18] Motorola, on the other hand, argues that we should retain the 180 day grace period for reinstatement.[19]

12. SIRSA's proposal suggests that we could significantly increase the availability of scarce land mobile radio channels, particularly in the frequency bands above 470 MHz where exclusive channel assignments are made, by establishing a shorter and more definite time period for reinstatement. Our experience indicates that most licensees who allow their land mobile radio licenses to expire file for reinstatement within 90 days of their license expiration date.[20] We are, therefore, asking for comments on a proposal to reduce our license reinstatement period from 180 days to 90 days, and to codify that change in our rules. Licensees have an obligation to comply with our operating and procedural rules and must exercise reasonable diligence to protect their station authorizations. To this end, licensees should seek renewal of their authorizations in a timely manner; if they fail to do so, they should at least seek reinstatement promptly. A 90-day reinstatement period should afford all private land mobile radio users sufficient time to ask for reinstatement of their expired licenses. If a licensee did not seek reinstatement within this 90-day period, its license would be deleted automatically from our records and the channels would be considered available for assignment in accordance with our regular licensing procedures. We ask commenters whether a 90 day reinstatement period is sufficient to meet the needs of most private land mobile licensees. We also request comments on whether the reinstatement period should be reduced to some level less than 90 days or whether licensees should be required to file for renewal of their licenses by the license expiration date, with no reinstatement period; licenses would cancel automatically by their own terms and the channels would subsequently be available for licensing to other applicants.[21]

13. SIRSA's next suggestion, that coordinators be permitted to recommend frequencies to new applicants on the ninety-first day after the license expires regardless of whether the license has been deleted from our records, presents some problems. SIRSA contends that our current procedures effectively protect expired licenses until they are deleted from our license records and, consequently, delay reassignment of those frequencies to other applicants. To implement the proposal, however, could create problems for us, the coordinators, existing licensees, and an innocent new applicant that is seeking an encumbered frequency. For example, an existing licensee may file a timely reinstatement request near the end of the reinstatement period. The application may not be processed for several days following its receipt by the Commission. Were we to grant the reinstatement application, the coordinator's recommendation of the current licensee's frequency on the 91st day to a new applicant would not be based on up-to-date information, and, therefore, may well be inappropriate. Moreover, the new applicant's application would then have to be dismissed and the FCC filing fee forfeited. Such a situation could undermine public perceptions of the frequency coordination process and the fairness of our licensing procedures. We do not, therefore, propose to adopt this proposal. We do propose, however, to attempt to accommodate SIRSA's goal of making frequencies encumbered by expired licenses available for reassignment more expeditiously in the following fashion. On the last business day of each month, we will delete

from our records licenses that expired in the fourth calendar month previously, and for which we have not received timely reinstatement applications.[22] Frequencies encumbered by expired licenses will therefore be made available for assignment approximately three months sooner than under our current procedures. *See* note 16, *supra*. We seek comment on this alternative to SIRSA's proposal.

14. NABER, as noted above, also suggests that we require licensees seeking reinstatement more than thirty (30) days after their license expiration date to be recoordinated. We tentatively conclude that we should reject this proposal. Applicants seeking license reinstatement within the prescribed time period do not now need to seek a new frequency coordination. A new coordination is only required when an applicant seeks new or modified facilities and, thus, adds to or changes information in our license records.[23] An existing licensee that seeks reinstatement for its existing facilities in a timely manner is not asking for new or modified facilities, and, therefore, frequency coordination would add nothing to our licensing records and procedures.

15. To make the reinstatement process simpler, we propose to give licensees wider latitude on what application form to use when seeking reinstatement. Private land mobile radio applicants applying to renew their authorizations file either FCC Form 574-R or FCC Form 405-A,[24] both of which are rather simple applications. A licensee seeking reinstatement, however, is required to file on FCC Form 574, the more complex form used by applicants for new land mobile radio facilities. Applicants seeking reinstatement nonetheless often file on either FCC Form 574-R or 405-A. In the past, we have returned these applications and required licensees to resubmit their reinstatement requests on FCC Form 574. Upon review of this procedure, we propose to permit licensees filing on a timely basis for reinstatement of their licenses, without modification, to submit either FCC Form 405-A, Form 574, or Form 574-R. We request comments on this proposal.

16. *Finder's Preference*. SIRSA and NABER also recommend that a finder's preference scheme be established to provide incentives to persons to assist us in recovering 800 MHz and 900 MHz channels for non-compliance with our construction, loading, or operational rules.[25] Pursuant to the suggested procedure, persons with information that might lead to a channel recovery would file the information with us identifying the licensee and frequency in question and detailed information about the alleged rule violation. Simultaneously, the persons alleging the rule violations would submit to the appropriate frequency coordinator a completed FCC Form 574 for the frequency in question, the appropriate coordination and FCC licensing fees, and a copy of the information submitted to us regarding the alleged rule violations. The frequency coordinator would then conduct a preliminary review of the application for completeness and accuracy, thereby verifying that the only issue standing in the way of a frequency recommendation is whether the existing license has canceled for non-compliance with our construction, loading, or operational rules. If the application is incomplete or inaccurate, the coordinator would return it and all fees to the applicant.

17. If the application passes this preliminary review, SIRSA and NABER suggest that they would then notify the Commission of the request for the frequency and would hold the application until the Commission determined the accuracy of the complaint. The frequency coordinator, in this respect, would retain only the first acceptable application and would return any subsequently filed applications for the same frequency in the same market. If the complaint is ultimately verified and the channels are recovered for non-compliance with our Rules, SIRSA and NABER propose that we notify the coordinator who would then coordinate the application and submit it to us for licensing.

18. SIRSA and NABER maintain that these proposed procedures would maximize utilization of scarce frequencies by getting unused or underutilized channels into the control of applicants who need them. We agree that a finder's preference has potential advantages. Frequencies in the 800 MHz and 900 MHz bands are extremely scarce in many areas, making it difficult for new applicants to be licensed and for existing licensees to expand their systems. We do, of course, conduct several oversight programs to assure to the extent possible that such channels, once licensed, are constructed and placed in operation. We conduct a construction compliance program and review the loading of Specialized Mobile Radio Systems that are located in wait list areas to assure that they are using their channels in compliance with our loading standards.[26] Our compliance review programs have been productive, with 824 channels recovered for failure to construct and 152 channels recovered for failure to meet our loading standards during this past fiscal year. Our compliance activities, however, are limited because of staff resources. We are, therefore, interested in seeking comments on the SIRSA/NABER finder's preference proposal, as modified herein, that is designed to reward persons who constructively and effectively assist us in ensuring proper use of the private radio spectrum.

19. SIRSA and NABER suggest that the finder's preference apply to exclusive channel assignments in the 800-900 MHz band. ASNA, however, states that the finder's preference should not apply to Specialized Mobile Radio Category channels in this band because effective reassignment procedures for these channels already exist.[27] We, too, tentatively conclude that a finder's preference in the 800-900 MHz band should be limited to those frequencies that are assigned on an exclusive basis.[28] Similarly, we propose to apply the finder's preference to channels in the 470-512 MHz range, which can also be assigned on an exclusive basis. By Notice of Proposed Rule Making in PR Docket No. 89-553, 4 FCC Rcd 8593 (1989), we proposed to provide for exclusive assignments in the 220-222 MHz band. We have included this band in our rules proposed herein to reflect our intention to apply the finder's preference procedure there as well. With regard to Specialized Mobile Radio channels, in many markets these channels have already been assigned and wait lists have been established for applicants that want either to expand their systems or to enter the business in that area for the first time. It is our tentative conclusion that the established wait-list procedures should not be changed. Marketplace monitoring of the Specialized Mobile Radio industry, however, could reveal instances of significant underutilization of channels that our existing compliance procedures do not reveal. We therefore ask for comments on whether applying the finder's preference scheme to this category of channels should replace the existing wait-list procedures or whether the two procedures could be used in tandem.

20. SIRSA and NABER suggest that the finder's preference be applied only to situations where it is revealed that a licensee has failed to comply with our construction, loading, or slow growth implementation rules. They also propose that the preference be applied when an applicant arranges for an existing licensee to request license cancellation voluntarily. In this latter situation, SIRSA and NABER suggest that the applicant would submit with its preference request a license cancellation notice (FCC Form 405-A) signed by the existing licensee.

21. The purpose of establishing a finder's preference is to encourage those active in the private land mobile industry to assist us in monitoring the radio environment. As previously noted, we conduct compliance review programs at regular intervals to determine whether applicants are complying with our construction, loading, and slow growth construction and implementation requirements. We stress that the establishment of a preference scheme must serve as a supplement to, rather than as a substitute for, our existing compliance programs and activities. We encourage, therefore, commenters to address not only our finder's preference proposal made in this proceeding but also to suggest additional ways or rule changes to improve our current compliance programs.

22. As suggested by SIRSA and NABER, we propose to establish rules and procedures to award a preference to applicants that call to our attention violations of our construction (including extended implementation schedules) and loading rules that ultimately result in the recovery of channels in the bands identified.[29] Additionally, we propose to apply the preference to instances where a licensee has permanently discontinued operations and has failed to so report to us as required and where a finder provides us with a cancellation notice accompanied by a preference request. Applicants identifying violations of these requirements may be able to uncover facts of which we are not aware or which we cannot readily ascertain. While we will propose to establish a finder's preference for applicants who constructively and effectively assist us in recovering channels, we will not apply the preference to any case that is scheduled to come up for regular review during our normal compliance activities. Nor will the preference be awarded to an applicant that calls to our attention a case already under compliance review or investigation.[30]

23. To be granted a preference, the applicant will be required to file certain information with us. First, we propose that the preference request be addressed to the Chief, Compliance Branch, Private Radio Bureau, 2025 M Street, N.W., Washington, D.C. 20554, and that it be sent by certified mail. This will establish the date the request was filed. Second, the applicant's letter must be in the form of a declaration under penalty of perjury,[31] and must specifically state that it is seeking a preference for specified channels to assure that there is no dispute at a later date that such a preference was being requested. This requirement will also assist us in distinguishing the preference request from the many general complaints that we receive about licensees. Third, the applicant will be required to provide detailed information about the alleged rule violation, including (i) the name and address of the licensee; (ii) the licensee's call sign and the location of the licensed facility; (iii) the frequencies of the licensed facility; (iv) the Commission Rule that the licensee is allegedly violating; (v) a statement of how the licensee is violating this Rule, including the dates of any provisions or benchmarks the licensee failed to meet (*e.g.*, construction date); and, (vi) a detailed statement as to the specific basis for the applicant's knowledge of the alleged Rule violation. We also seek comments on whether we should require the applicant to serve a copy of its complaint on the licensee by certified mail and to submit a statement of such service with the preference request filed with us.

24. SIRSA and NABER suggest that a person wishing to receive a finder's preference should initiate the process by filing a license application with the appropriate coordinator. It appears, however, to be unnecessary for the coordinator to review an application unless and until we determine that the requested frequency is available. We propose, therefore, that submitting a finder's preference request to our Compliance Branch will be sufficient to initiate a Commission inquiry, and that the filing of a license application will not become necessary until we determine that the applicant is entitled to a preference. At that time the applicant will be advised to follow the applicable frequency coordination procedures. The subsequent application, along with the Commission's letter awarding the preference, would be required to be submitted to the coordinator within 30 days of the date of that letter. Should that not be done or should the application be defective and dismissed, the applicant will lose its preference and assignment of the recovered channel will be on a first-come, first-served basis. We request comments, however, on whether the preference request need be provided to the coordinator at the same time it is made to the Commission.

25. We ask for comments on whether these guidelines are adequate, particularly as to the specifics that should be set forth in a preference request. General and conclusory statements that a licensee has not constructed, is not loaded, has failed to comply with its slow-growth implementation schedule, or has discontinued operations will not suffice to cause us to undertake an investigation. Indeed, the cost of filing a preference request is minimal to the applicant but could result in the expenditure of considerable resources by this agency. Accordingly, the applicant must submit sufficient information to establish a *prima facie* violation of our Rules. Otherwise, under our prosecutorial discretion, the request for preference will be dismissed without action.

26. In proposing to establish a finder's preference we have considered the legal requirements of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), which stands for the principle that this Commission must give comparative consideration to all *bona fide* mutually exclusive applications. We recently considered the requirements of *Ashbacker* in a similar context when we proposed to establish a licensing preference for persons who develop innovative communications technologies.[32] In that proceeding we tentatively concluded that the preference in question was consistent with *Ashbacker* because it amounted to a threshold standard that applicants must satisfy before they are entitled to be eligible for comparative consideration.[33] In some instances, threshold standards may limit eligibility to a class of one. For similar reasons, we tentatively conclude that a finder's preference is consistent with *Ashbacker*.

27. In the case of a finder's preference, the class of eligibles would be limited to the informant(s) who meet minimum acceptable standards. Following our first-come, first-served policy[34], we propose to consider as mutually exclusive only those letters of complaint that: (1) meet the

specific content requirements outlined previously; and (2) are filed with the Compliance Branch on the first day in which any such acceptable filing is received. If only one complaint meets these qualifications, others filed thereafter would not be mutually exclusive. It is unlikely that we would receive two or more letters on the same day making the same complaint. If this should happen, however, we would hold a lottery[35] upon channel recovery to determine which applicant would be entitled to the finder's preference.

28. Although we want to encourage the industry to assist us in monitoring the use of the private radio spectrum and believe it is in the public interest to reward those who constructively and effectively help us, there is the potential for abuse of the process. For example, an applicant could misuse the process by harassing competitors with false complaints or by making unsubstantiated allegations against all persons licensed in a particular market in hope that one of the allegations will prove correct. We will view any abuse of our processes seriously and will take appropriate action against any applicant that engages in such conduct, including, but not limited to, the imposition of monetary forfeitures, the suspension or revocation of the applicant's other licenses, if they exist, or barring the applicant from obtaining additional channels. We also are aware that an applicant for a preference could enter into an agreement to turn in a licensee merely to circumvent the prohibition against assignment of unconstructed stations. *See* 47 C.F.R. § 90.609(b). In this regard, we ask whether an applicant seeking preference should certify that it has not compensated, in any way, the licensee of the unconstructed station to accomplish this transaction.

III. INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason For Action

29. The Commission is proposing these rule changes to reassign expired licenses more efficiently, and to encourage the public to assist our channel recovery efforts. These actions will foster spectrum efficiency by identifying more channels that are not being used and by reassigning these channels to persons who will use them effectively.

Legal Basis

30. The proposed amendments to the Commission's Rules, as set forth in the attached Appendix, are issued under the authority contained in Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 332(a).

Reporting, recordkeeping and other compliance requirements

31. The proposal on expired licenses, would impose no additional reporting, recordkeeping, or other reporting requirement. The proposal concerning a finder's preference would require applicants who wish to receive this preference to file specific information detailing the current licensee's violations of our Rules. This collection of information requirement has been submitted to the Office of Management and Budget (OMB) for review under Section 3504(h) of the Paperwork Reduction Act.

Federal rules which overlap, duplicate, or conflict with this rule

32. None.

Description, potential impact, and number of small entities affected

33. Small businesses applying for private land mobile radio licenses could be positively affected by this proposal because they may be licensed sooner or with more certainty than under current Rules. Current licensees who are not in compliance with our Rules may have a greater chance of being investigated and having their licenses canceled.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

34. Aside from maintaining the *status quo*, we do not know of significant alternatives other than those considered in this *Notice of Proposed Rule Making*. However, if commenters believe that there are alternatives preferable to those identified, we encourage them to bring these alternatives to our attention.

IV. PAPERWORK REDUCTION ACT STATEMENT

35. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. PROCEDURAL MATTERS

36. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

37. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular

proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

38. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

39. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested persons may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991.** Extensions of time to file comments or replies are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the *Report and Order.*

40. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

A. 47 C.F.R. Part 1 is proposed to be amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. 47 C.F.R. § 1.926 is amended by adding a new paragraph (c) to read as follows:

§ 1.926 Application for renewal of license.

* * * * *

(c) Reinstatement of an expired license in the Private Land Mobile Radio Services may be requested up to ninety (90) days after the expiration date using FCC Form 574, 574-R or 405-A.

B. 47 C.F.R. Part 90 is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.119 is amended by adding new paragraph (a)(5) and by revising paragraphs (e)(1) and (h) to read as follows:

§ 90.119 Application forms.

(a) * * *

(5) For reinstatement of an expired license. *See also* paragraphs (e)(1) and (h) of this section.

* * * * *

(e) * * *

(1) Apply for a renewal or reinstatement without modification of a station or system license when the licensee has not received renewal Form 574-R in the mail from the Commission within sixty (60) days of license expiration.

* * * * *

(h) Form 574-R shall be used to apply for renewal or reinstatement of an existing authorization without modification of the station or system license. (Form 574-R is generated by the Commission and mailed to the licensee prior to the expiration of the license term.)

3. 47 C.F.R. § 90.127 is amended by adding a last sentence to paragraph (b) to read as follows:

§ 90.127 Submission and filing of applications.

* * * * *

(b) * * * Applications for reinstatement must be filed no later than ninety (90) days after the expiration date of the license.

* * * * *

4. 47 C.F.R. § 90.149 is amended by adding a new paragraph (b) and redesignating existing paragraph (b) as paragraph (c) to read as follows:

§ 90.149 License term.

* * * * *

(b) If no application for renewal or reinstatement has been filed as specified in this Part, the authorization shall be deemed to have automatically cancelled on the date specified on the authorization.

* * * * *

5. 47 C.F.R. § 90.155 is amended by adding a new paragraph (c) to read as follows:

§ 90.155 Time in which station must be placed in operation.

* * * * *

(c) For purposes of this section, a base station is not considered operational unless associated mobile stations are also operational.

6. 47 C.F.R. § 90.157 is amended by revising paragraph (a), by removing paragraph (b) and redesignating paragraph (c) as paragraph (b) to read as follows:

§ 90.157 Discontinuance of station operation.

(a) The license for a station shall cancel automatically upon permanent discontinuance of operations and the licensee shall forward the station license to the Commission. Alternatively, the licensee may notify the Commission of the closure or discontinuance of operations of the station by checking the appropriate box on Form 574-R or Form 405-A and requesting license cancellation. Notification of discontinued operation or cancellation shall be sent to the Federal Communications Commission, Gettysburg, Pennsylvania 17325.

* * * * *

7. 47 C.F.R. § 90.173 is amended by adding a new paragraph (k) to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(k) Notwithstanding any other provisions of this Part, any person may seek a preference for a channel assignment in the 220-222 MHz, 470-512 MHz, and 800-900 MHz bands (except for frequencies in the Specialized Mobile Radio Service Category and the one-way paging frequencies in the 929-930 MHz band) by submitting information that ultimately results in the recovery of frequencies in these bands because an existing licensee has failed to comply with the provisions of Sections 90.155, 90.157, 90.313, 90.629, 90.631 and 90.633 of this Part. The preference request shall be clearly marked "Request for Finder's Preference", addressed to the Chief, Compliance Branch, Private Radio Bureau, Washington, D.C. 20554 and sent by Certified Mail. The request shall contain detailed information to establish a *prima facie* violation, including: (i) the name and address of the licensee alledgely violating the applicable rules; (ii) the licensee's call sign, frequencies and location of the licensed facility; (iii) the Commission Rule(s) that the licensee is allegedly violating, including the dates or benchmarks the licensee has failed to meet; and (iv) a detailed statement as to the specific basis for the applicant's knowledge that the licensee is violating the rules specified in this section. General and conclusory statements shall result in the summary dismissal of any such request. All preference requests shall be dated and subscribed by the person as true under penalty of perjury as set forth in Section 1.16 of this Chapter. The preference provided for in this subsection may also be awarded to any person who arranges for an existing licensee to request license cancellation voluntarily. The preference provided for in this subsection shall not apply to any construction or loading case that is scheduled to come up for regular review during the Private Radio Bureau's normal compliance activities or to a case already under review. This preference shall not be used to accomplish the assignment of a license of an unconstructed station.

8. 47 C.F.R. § 90.175 is amended by revising the introductory paragraph to read as follows:

§ 90.175 Frequency coordination requirements.

Except for applications listed in paragraph (f) of this section, each application for a new frequency assignment, for a change in existing facilities as listed in § 90.135(a), or for operation at temporary locations in accordance with § 90.137, must include a showing of frequency coordination as set forth below. Application to renew or reinstate a license expired for more than 90 days will be considered as a request for a new frequency assignment. When frequencies are shared by more than one service, concurrence must be obtained from the other applicable certified coordinators.

* * * * *

9. 47 C.F.R. § 90.631 is amended by adding a last sentence to paragraph (f) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(f) * * * For purposes of this section, a base station is not considered operational unless associated mobile stations are also operational.

* * * * *

10. 47 C.F.R. § 90.633 is amended by revising paragraph (d) to read as follows:

§ 90.633 Conventional systems loading requirements.

* * * * *

(d) If a station is not placed in permanent operation in eight months, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered operational unless associated mobile stations are also operational.

* * * * *

FOOTNOTES

[1] Exclusivity of a channel to a particular licensee has the effect of precluding the licensing of additional users on that channel in the licensee's area of operation.

[2] *See* 47 U.S.C. § 303(g).

[3] Specifically, the VHF frequencies in the 25-50 MHz and 150-174 MHz bands, UHF frequencies in the 450-470 MHz band, the shared UHF-TV frequencies between 470-512 MHz, and the 800/900 MHz frequencies.

[4] Persons eligible to be licensed in the private land mobile radio services include, among others, local governments, police agencies, fire departments, highway maintenance organizations, forestry conservation agencies, medical personnel, rescue organizations, the physically handicapped, veterinarians, disaster relief organizations, school bus operators, beach patrols, utility power entities, petrolum companies, forest product producers, motion picture companies, relay press companies, industry, businesses, manufacturers, telephone maintenance personnel, motor carrier companies, railroads, taxicabs, automobile emergency personnel, and Specialized Mobile Radio (SMR) operators.

[5] *See generally* 47 C.F.R. §§ 90.143 and 90.611.

[6] *See* 47 C.F.R. § 90.149.

[7] *See* 47 C.F.R. §§ 90.155, 90.633(c) and (d).

[8] *See* 47 C.F.R. § 90.631(e).

[9] In the alternative, we ask for comments on whether a construction requirement alone would satisfy our desire that licensed facilities be placed in use. That is, can we forego the requirement to place a station in operation within a specified time period if the construction requirement is met? In this regard, is the cancellation of a license if operation is permanently discontinued sufficient regulatory control to ensure use of the radio spectrum? *See* discussion in para. 5-6, *infra*.

[10] Even if the license is not returned, it is still cancelled.

[11] *See* 47 C.F.R. § 90.157.

[12] *See* 47 C.F.R. § 90.127 (b). A timely-filed renewal application extends the expiration date of the license until Commission action has been completed. *Id.* Because there is no such provision for an untimely-filed renewal application, however, an untimely request will require a license reinstatement unless the Commission grants the request prior to the expiration date.

[13] Because licensees do not retain any rights to operate their stations after expiration of their licenses, continued operation beyond the expiration date without the filing of timely renewal requests technically constitutes unlicensed operations. *See* 47 U.S.C. § 301. As a matter of public policy and administrative convenience, however, we generally forbear from taking enforcement action for unauthorized operation in this situation in the private land mobile radio services if a timely request for reinstatement is filed.

[14] *See* 47 C.F.R. § 90.175 and Form 574 Instruction Booklet (August 1989) at 25. A licensee failing to file timely for reinstatement may or may not be relicensed on its original frequency depending on circumstances occuring between the time of license termination and the filing of a new application.

[15] Generally speaking, a frequency remains encumbered until the license records are deleted from our automated data base, which usually occurs approximately seven months after the expiration date of a non-renewed license. Consequently, frequencies encumbered by an expired license do not become available for further assignment until the data base is purged, which alerts all interested applicants and the coordinators that the channels are no longer encumbered. The term encumbered as used herein may refer either to a frequency assigned on an exclusive basis to a licensee in a given area of operation, and thus by rule precluded from being licensed to another party in that area, or to a shared frequency that is so heavily used that it may not be appropriate to be recommended for additional use.

[16] SIRSA, Petition for Rule Making, RM-6910, (filed June 23, 1989).

[17] *See* Comments of Forest Industries Telecommunications Association (FIT), E.F. Johnson, the American Petroleum Institute (API), the Utilities Telecommunications Council (UTC), the National Association of Business and Educational Radio, Inc. (NABER), the American SMR Network Association (ASNA), and Motorola.

[18] *See* Comments of NABER at 5.

[19] *See* Comments of Motorola at 2.

[20] While we do not maintain specific data on the timing of reinstatement applications, we can readily gather information on the extent to which licenses are not renewed or reinstated. To this end, we performed an internal review of licensing records for two major markets for a six month period. This review indicated that few licensees allow their licenses to expire or fail to seek reinstatement. On shared spectrum below 470 MHz, several licenses were found not to have been renewed or reinstated. Above 470 MHz, where exclusivity can be obtained, only two licenses had not been renewed or reinstated. These results are not surprising. Where licenses are more valuable, a licensee is more likely to assign the license to another party rather than let the license expire.

[21] Section 308(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(a), provides that the Commission can renew a license only upon application therefor. Section 307(c) of the Communications Act, 47 U.S.C. § 307(c), provides that, upon the expiration of any license, and upon application therefor, a renewal of a license may be granted for a term not to exceed ten years in the case of non-broadcast station licenses. Section 307(c) provides further that, pending any final decision on a renewal application, including the disposition of any peti-

tion for reconsideration, the Commission shall continue such license in effect. Without the filing of a formal application, however, the radio station license automatically cancels on its expiration date. Operations after that time are not specifically authorized by the Communications Act.

[22] The following example illustrates our proposed procedures. All licenses expiring in January of 1991 would be deleted from our records on the last business day of May 1991 if reinstatement requests have not been filed within 90 days from expiration (regardless of whether that 90th day falls in April or May). For example, a licensee whose license expires on Tuesday, January 1, 1991 will have until Monday, April 1, 1991 to file a reinstatement application. *See* 47 C.F.R. § 1.4(c). If such an application is not filed by that date, we will delete from our data base the record of that license on Friday, May 31, 1991. Likewise, on May 31, 1991 the record of a license expiring on Thursday, January 31, 1991 will be deleted if a reinstatement application has not been filed by Wednesday, May 1, 1991.

[23] A late-filed reinstatement application will not rescue an expired license from deletion from our records. A new application would have to be filed. Coordination of such an application would, therefore, be equivalent to that required for an application for a new system.

[24] *See* 47 C.F.R. § 90.119.

[25] *See* Letters from Mark E. Crosby, President, SIRSA and Emmett B. Kitchen, Jr., President, NABER to Ralph A. Haller, Chief, Private Radio Bureau (June 30, 1988 and October 18, 1989).

[26] *See* 47 C.F.R. § 90.631.

[27] *See* Letter from Russell H. Fox, President, ASNA to Ralph A. Haller, Chief, Private Radio Bureau (dated March 9, 1990).

[28] A finder's preference would be of little value where spectrum is shared because there are no absolute preclusive provisions to prevent new applicants from being licensed on those frequencies.

[29] Ashbacker Radio Corp. v FCC, 326 U.S. 327 (1945) provides that we may establish Rules and procedures governing the filing of applications. As noted, herein, applications for private land mobile radio stations are processed sequentially on a first-come, first-served basis. We propose that requests for a finder's preference be processed sequentially on a first-come, first-served basis on the date on which such requests are appropriately filed with us.

[30] Because we maintain a program overseeing construction and loading compliance, we would not grant a preference to persons providing information during the pendancy of an outstanding investigation. Applicants may contact the Chief of the Private Radio Bureau's Compliance Branch prior to filing a preference request to verify whether the licensee is under investigation. Likewise, we would not accept a request prior to our initiating a compliance action that is due for review or prior to an actual violation, *e.g.*, claiming non-construction of a station before the construction deadline. Because we do not currently maintain a compliance program routinely monitoring discontinued operations, this concern regarding that type of violation would not be involved.

[31] *See* 47 C.F.R. § 1.16.

[32] Notice of Proposed Rule Making, Gen Docket No. 90-217, 5 FCC Rcd 2766, 2767 (1990).

[33] *Id.*, *citing* United States v. Storer Broadcasting Co., 351 U.S. 192, 202-05 (1956).

[34] *See* 47 C.F.R. § 90.143(b).

[35] The Private Radio Bureau employs lotteries in many other situations where there are more mutually exclusive applications than frequencies available. *See* 47 C.F.R. § 1.972.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-54[1]
Gen. Docket No. 80-113

In re

Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting:

Private Operational-Fixed Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint Distribution Service,
Instructional Television Fixed Service, and
Cable Television Relay Service

REPORT AND ORDER

Adopted: October 11, 1990; Released: October 26, 1990

By the Commission:

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I. INTRODUCTION

1. On February 22, 1990, we released a *Notice of Proposed Rule Making and Notice of Inquiry* that proposed to modify certain rules and policies governing the various microwave radio channels that can be collectively utilized for the provision of "wireless cable" service.[2] The objectives of the *Notice* were to review and simplify, where possible, the disparate technical, procedural, ownership, and other requirements and restrictions applicable to the various microwave channels utilized by wireless cable operators so as to facilitate wireless cable service. In this Report and Order, we adopt new rules and modify existing rules consistent with these objectives. [3]

2. Wireless cable is a service which provides multiple channels of video entertainment and informational programming using a combination of old and relatively new technologies. Typically, a wireless cable service provider will install special microwave equipment for reception of the signals it provides, with additional inputs from the subscriber's standard television reception equipment. (The subscriber's VHF/UHF reception equipment may be upgraded by the installer.) This installation provides subscribers with a simple-to-use format for the selection of available over-the-air signals and the subscription microwave channels provided by the wireless cable operator. By use of the term "wireless cable", we do not intend to suggest that these services constitute cable service for any statutory or regulatory purpose. Although wireless cable service resembles cable television service by virtue of the type of programming it provides as well as its multichannel character, it uses over-the-air microwave radio channels rather than cable to deliver video material to subscribers.

3. The frequencies which may be used for wireless cable are those in the Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).[4] In addition, channels in the Private Operational-Fixed Microwave Service (OFS) are permitted to be used for MDS- type service, and the channels in the Instructional Television Fixed Service (ITFS) can be leased for MDS-type use on a part-time basis.[5] Use of these frequencies is governed by three different sets of rules: Part 21 applies to the MDS and MMDS channels, Part 94 applies to the OFS channels, and Part 74 applies to the ITFS channels. As we stated in the *Notice*, most of the rules at issue in this proceeding were established in the infancy of the various services they govern, long be-

fore the development of the wireless cable industry. Consequently, these rules not only contain possibly obsolete limitations but also vary substantially from service to service.

4. We therefore proposed several rule changes in the *Notice* in an effort to conform the rules in the affected services to afford wireless cable operators a more accommodating regulatory framework. First, we proposed to eliminate limitations that inhibit channel usage, such as ownership restrictions which limit the number of MDS and OFS channels that can be licensed to a single entity. We also proposed to simplify technical requirements so as to expedite the initiation of new service on available channels, and proposed various modifications regarding point-to-point ITFS systems, ITFS leasing rules, and cross-ownership with cable systems. Further, we proposed modifications which would improve service capabilities, such as increasing permissible power limits, clarifying the definition of protected service areas, providing access to auxiliary frequencies and the cable television relay service (CARS) band, and revising a variety of performance and other technical standards. We also sought comment regarding the use of signal boosters and response channels, application filing procedures, and annual reports currently required of some MDS operators.

5. In addition, we initiated an inquiry with respect to reallocation of the OFS H channels to MDS. Based on comments we received regarding this issue, we are also adopting today a *Further Notice of Proposed Rule Making* proposing to reallocate the H channels to MDS.[6] Accordingly, we will not take action here on individual proposals in the *Notice* that had been intended to conform various OFS rules to corresponding MDS rules. We also initiated an inquiry in the *Notice* regarding the licensing of non-ITFS entities on unused ITFS frequencies. This issue is addressed in the *Further Notice*. Finally, the *Further Notice* seeks comment on some of the specific measures intended to implement the rule and policy changes adopted here, and proposes some additional measures that are a logical outgrowth of those adopted.

6. With this Order, we implement most of the rule changes proposed in the *Notice*. We anticipate that the rule and policy changes adopted here, and the additional modifications proposed here, will remove or reduce a number of barriers to the fullest possible development of wireless cable service. This result should enhance the viability of wireless cable service and its stature as a competitive force in the multichannel video delivery marketplace. First, in Section II, we modify several rules to increase the availability of MDS channels for use in wireless cable systems. We eliminate MDS ownership restrictions and simplify various rules governing the application process, the initiation of service on new channels, and the modification of existing facilities, licenses, or applications to permit authorization of larger and more serviceable wireless cable systems. In Section III, we modify equipment standards and other technical requirements to increase service capabilities and improve the quality of various aspects of wireless cable service. In Section IV, we relax certain administrative requirements to reduce the burdens they impose.

7. Many of the rule changes adopted in this *Report and Order* affect ITFS service. As we stated in the *Notice*, our effort to facilitate the expansion of wireless cable service as a competitive multichannel source of programming in no way reflects any diminishing Commission commitment to the further development of ITFS. *Notice* at 971. We continue to believe that ITFS is a vital part of this country's educational landscape, and we anticipate that ITFS will take on increasing importance as new technology is introduced that will enable ITFS systems to reach more users at minimal additional cost. The modifications adopted here should not jeopardize the current or future ability of ITFS to fulfill its primary intended purpose of providing educational material for instructional use. On the contrary, we believe that these changes will enhance ITFS by improving service quality and potentially increasing the revenues received by ITFS entities through the leasing of excess capacity. In addition, we continue to believe that educational institutions should be treated differently than commercial entities in many situations due to limited financial and staff resources, governmental constraints, and similar factors. We have endeavored in this proceeding to compensate for these limitations in our procedural rules and to afford ITFS licensees as much latitude as possible in designing and operating their systems.

II. INCREASING CHANNEL AVAILABILITY

A. Ownership Restrictions

8. *Background / Proposal.* At present, a single operator may not acquire a license for both groups of four MMDS channels, nor may it acquire a license for more than one OFS channel in a market.[7] Consequently, an entity desiring to operate a competitive multichannel system must lease channels from a number of different licensees, just to assemble into one system the channels now allocated for MDS use. As we described in the *Notice*, the original purpose of the MMDS ownership restriction was to provide for competition between MDS programmers within each community. As the nature of the competitive multichannel marketplace has changed, however, we believe that these ownership restrictions have become detrimental to the development of wireless cable as a viable competitor to cable service, and we proposed that they be eliminated. In anticipation of possible changes in the ownership restrictions, we also sought comment regarding whether sales of conditional licenses for facilities which have not been built should be permitted. *Notice* at 972-73.

9. *Resolution.* Commenters overwhelmingly support our proposal to remove ownership restrictions on MMDS licensees, and we will do so.[8] This rule change will become effective upon publication of a summary of this *Report and Order* in the Federal Register.[9] After consideration of the record,[10] we are convinced that, as suggested in the *Notice*, MDS channels will provide a more significant benefit to the public if used collectively by a single operator in each community competing with cable operators than if used individually by multiple operators in each community competing against each other. To this end, as commenters argued, wireless cable systems need to control as many channels as possible in order to compete with cable systems, and leasing channels from multiple licensees is unnecessarily burdensome and time-consuming for both wireless cable operators and the Commission. Not only must lease agreements be negotiated and serviced, but technical coordination, such as colocating transmitters and conforming performance characteristics, must also be effected in order to initiate and then maintain compatibility of the distinct systems. Moreover, the

uncertainty regarding the ultimate size of a system that must be assembled lease by lease discourages investment in the wireless cable industry.

10. The only dissent comes from the Hispanic Information and Telecommunications Network (HITN) and the Association for Higher Education of North Texas, *et. al* (Joint Educational Parties), who contend that removing ownership restrictions would force ITFS operators to negotiate with monopoly MDS providers who could extract unreasonably low lease rates. We disagree. The benefits to ITFS licensees of competitive bidding for ITFS excess capacity are meager when the bidding competitors have limited prospects. Instead, the elimination of the MMDS ownership restrictions should enhance the overall vitality of the industry so that wireless cable demand for ITFS channels should increase, and with it the opportunity for ITFS licensees to benefit from cooperation with wireless cable operators.

11. Of the few commenters that addressed the sale of conditional licenses,[11] most argue that for-profit sales should be permitted. They submit that allowing the for-profit sale of authorizations for unbuilt stations would expedite the introduction of new wireless cable services and would reduce the cost of delivering wireless cable services to the public. We are concerned, as we have been in considering similar provisions for other services,[12] that such a provision would encourage the filing of speculative applications and, on balance, delay and increase the cost of the introduction of service on MDS channels to the detriment of the viewing public. We believe, however, that an entity holding a conditional license for an unbuilt MDS facility may be encouraged to transfer that facility to a viable operator, rather than lose its conditional license at the end of the construction period, if it is permitted to at least recoup its expenses. We therefore retain the current rule that allows the recouping of expenses for conditional licensees.[13]

B. Initiation of Service on Additional Channels

1. Modifications to Reduce Interference

12. *Background / Proposal.* An applicant proposing to modify an MDS license or to amend a pending MDS application must demonstrate that the proposed facility will not result in harmful interference within the protected service area of any existing or previously proposed co-channel or adjacent- channel MDS station within 50 miles or to the radio horizon. 47 C.F.R. §§ 21.902(a), 21.902(b)(3), 21.902(b)(4), 21.904(b)(2). However, MDS stations on the E and F channels may be modified "in order to minimize interference potential with other MDS and ITFS operations." *First Report and Order* in Gen. Docket No. 80-112, 94 FCC2d 1203, 1265 (1983).

13. In the *Notice*, we found that some MDS applicants have complained that it is unclear what demonstration is required to show that the proposed modification would minimize the interference potential, and that the rule implies that harmful interference to protected MDS service areas must be eliminated. We proposed to amend Section 21.902 to clarify this requirement concerning certain modifications to MDS stations on the E and F channels for which applications had been filed in the initial round of filings in 1983.[14] We proposed to require a showing that the modification should neither increase the size of the geographic area that suffers harmful interference within the protected service area of another station originally applied for on the same day, nor cause harmful interference to any new portion of the protected service area of such station. We also solicited comment on whether we should consider the net increase or decrease in area or homes receiving harmful interference as the determinative factor in considering such modifications. *Notice* at 973.

14. *Resolution.* The proposal in the *Notice* has the virtually unanimous support of commenters, and our rules will be modified accordingly. An applicant seeking to modify an MMDS station proposed on September 9, 1983, must demonstrate that its proposed modification will not increase the potential for harmful interference to an interfered-with MMDS station also proposed on September 9, 1983. Specifically, the modification must not increase the size of the geographic area within the protected service area suffering harmful interference and must not cause harmful interference to any new portion of the protected service area of the interfered-with station.[15]

15. Some commenters complained that the modification process itself is too burdensome. One difficulty is the failure of some MDS applicants for the E and F channels to perfect their 1983 applications and, thus, to finalize the location and design of proposed stations. This delay can prevent operating stations in nearby cities from colocating and conforming adjacent-channel MDS stations in the same area. Based on our experience and the comments filed in this proceeding, we are revising our requirements for filing an interference analysis for such modification applications. When a licensee of an existing MDS station on the E or F channels files an application to modify constructed facilities proposed in the initial round of MMDS applications, the modification applicant is exempted from the Section 21.902 requirements to file an interference analysis for any co-channel or adjacent-channel initial-round MDS applicant for the E or F channels which has not perfected its application by providing the information necessary to process its application.

16. We reject the net area and net homes measurements as too uncertain and administratively burdensome, and as prejudicial to existing or previously proposed stations which have already been designed prior to the filing of the modification application. For example, an operating MMDS station that is receiving interference in one portion of its protected service area may have already designed its system or marketing efforts to emphasize service away from the interfered-with area. Any introduction of new interference then, even if accompanied by a decrease in interference elsewhere, can be harmful to an MDS station's operation. Of course, an affected station can choose to accept a change in interfered-with area and consent to a modification that would alter the area of interference within its protected service area. With regard to some comments filed concerning consent to interference, we note that we are not altering an MMDS station's obligation pursuant to 47 C.F.R. § 21.902(a) to avoid blocking co-channel use in nearby cities and adjacent-channel use in the same city. Alteration of this rule would prove to be too disruptive.

17. Two specific suggestions to ease the administrative burden on efforts to colocate facilities are already included in our rules. One is a suggestion by the Wireless Cable Association (WCA) that an amendment proposing to colocate with a facility proposed after the application was first filed will not be considered newly-filed pursuant to Section 21.31 if it will not cause interference. *See* 47

C.F.R. § 21.31(e)(2). The other is Mitchell Communications Corporation's suggestion that any proposal to colocate adjacent-channel facilities, particularly when those facilities are to be operated as part of the same system, be exempt from interference analysis among the colocated, commonly-controlled adjacent-channel authorizations. *See* 47 C.F.R. § 21.902(c)(3). The interference analysis required by this section is satisfied with a one-sentence statement that the stations will be colocated. Mitchell's suggestion that we increase the list of Section 21.42 modifications that do not require interference analysis or other showings will be pursued in the further Rule Making in this proceeding. *Further Notice* at para. 17. We also seek further comment in our companion *Further Notice* on HITN's suggestion that an existing licensee be required by the rules to permit colocation if another applicant or licensee is willing to bear all expenses related to colocation, including those costs necessary to protect the existing licensee's facilities and signal. *Id.* The proposal of Secure Business Communications that we consider the level of interference in addition to the area of interference is not feasible. The interference standard is calculated to represent the threshold at which an acceptable picture is no longer attainable with standard equipment, resulting in unacceptable picture quality. We will not quantify degrees of unacceptability.

2. ITFS Cooperation

18. *Background / Proposal.* The E and F channels are the only channels currently allocated for MDS use that could potentially interfere with ITFS stations. Section 21.902(i) of the Commission's Rules, (47 C.F.R. § 21.902(i)) provides that a non-mutually exclusive MDS applicant or tentative selectee after the random selection process for the E or F channels must, prior to receiving a conditional license, file an analysis demonstrating that the facility to be constructed will not cause harmful interference to existing co-channel or adjacent-channel ITFS receive locations within 50 miles of the proposed transmitter. In the alternative, the rule provides that the applicant may submit a statement from the affected ITFS licensee that the interference is acceptable.

19. Section 21.901(d)(1) of the Commission's Rules (47 C.F.R. § 21.901(d)(1)) provides that an MDS conditional licensee for the E or F channels must, prior to commencing construction, file a statement from all co-channel and adjacent-channel ITFS licensees, permittees, and applicants with transmitters within fifty miles of the proposed MMDS transmitter, indicating that the proposed MDS operation will not cause harmful interference to that ITFS entity's operating or proposed facilities, or that the ITFS operator will accept whatever interference occurs. If the MMDS conditional licensee is unable to obtain such a statement, it may submit a Petition for Declaratory Ruling on the issue of whether harmful interference will occur, and it must detail what efforts it made to obtain the statement from the ITFS operator.

20. Section 21.902(i) applies after the random selection process but before the MMDS applicant receives a construction authorization, and Section 21.901(d)(1) applies after the grant of a conditional license but before construction begins. In the *Notice*, we proposed to simplify the procedure by eliminating the ITFS consent statement requirement entirely and making the submission of analysis and notification to co-channel and adjacent-channel ITFS licensees, permittees, and applicants a one-time requirement for conditional licensees. *NoticeResolution.* We agree with most commenters that the current analysis and interference statement procedures for MDS entities applying for E and F channels are needlessly redundant, time-consuming, and expensive. We also agree with most commenters that analysis and notification should occur only once. We will therefore require, as urged by most commenters, that an MDS applicant file with its application[16] an engineering analysis demonstrating no harmful interference to each co-channel or adjacent-channel ITFS licensee with a transmitter site within 50 miles of the proposed MDS transmitter. (In the alternative, in lieu of an analysis for a channel or a channel group, an applicant may file a statement from the ITFS licensee on that channel or channel group stating that it does not object to the MMDS operation.)[17] We will also require that, upon filing its application with the Commission, an MDS applicant must serve a copy of the engineering analysis on the affected ITFS entities by certified mail, return receipt requested, and certify in its application that such service has been initiated. Twenty days after filing the application, the applicant must notify the Commission of which potentially affected parties received their notification and which have not. In order to provide ample time for ITFS entities to review such analyses, the application will be eligible for grant upon receipt of all relevant ITFS statements of no objection or 90 days after filing, whichever occurs first.[18] In no event will that application be granted until we have been advised of successful service of the required notifications or the applicant's diligent efforts where required service has not been successful.[19]

22. Commenters opposed to any change in the rules contended that current procedures assure that ITFS licensees are notified of proposed MDS facilities and are afforded the opportunity to conduct the necessary engineering research. We believe that the revised procedures we adopt here adequately respond to these concerns. By requiring that the analyses be sent by certified mail, return receipt requested, and that the applicant advise us as to the accomplishment of successful service early in the 90-day period, we ensure that notification will be sent to the correct address and in sufficient time to permit a potentially affected ITFS entity to protect its interests. Moreover, we believe that 90 days is ample time for an ITFS entity to conduct a proper engineering analysis and respond, if necessary, to the applicant or the Commission. Some commenters also argue that the Commission should intervene if the ITFS entity is not responsive and that ITFS entities should be able to seek recourse if interference occurs. If no response is forthcoming within 90 days, the Commission will presume that there is no objection.[20] If an affected ITFS entity is dissatisfied after making efforts to reach agreement with the MDS applicant on these engineering issues, it may file a petition to deny the MDS application on these grounds.[21] If an MDS applicant fails to notify an ITFS entity entitled to such notice, any license granted will be subject to possible revocation if it is subsequently demonstrated by an ITFS entity that it did not receive the notification and that it will suffer interference prohibited by the rules. 47 U.S.C. § 312(a)(2). If an interference analysis fails to identify an interference problem that later arises after the MDS station is in operation, the new licensee retains the obligation to correct such interference.

23. We did not propose in the *Notice* nor do we intend here to alter the substance of engineering analyses, although some commenters have raised objections to current engineering analysis formats and methods. We encourage MDS and ITFS entities and their engineers to develop an acceptable standardized format for engineering analyses, but we will not require them to do so. In addition, while several commenters argue that our notification and analysis criterion should be based on receive sites rather than transmitter sites, staff resources do not currently permit such a rule change. Registration of transmitter sites has thus far apparently been satisfactory. ITFS and MDS entities with transmitters beyond 50 miles from a proposed new or modified station have an affirmative obligation to raise interference objections based on their own analysis.[22]

3. The 10 dB ITFS Protection Standard

24. *Background / Proposal.* Harmful adjacent-channel interference is defined as a desired to undesired signal ratio of less than 0 dB, unless the protected ITFS station was constructed before May 26, 1983, in which case a ratio of less than 10 dB constitutes harmful interference. 47 C.F.R. §§ 21.902(f)(2), 74.903(a)(2). These older systems are provided with greater protection because of the characteristics of the equipment in use when they were constructed. Because new MDS and ITFS facilities have been proposed in some areas which could meet the 0 dB standard but not the 10 dB standard, we proposed in the *Notice* that applicants and conditional licensees can invoke the 0 dB interference protection standard at ITFS receive sites constructed prior to May 26, 1983, if they will pay the expenses involved in upgrading those sites with appropriate equipment. We sought comment as to whether this would facilitate the grant of additional MDS and ITFS applications or harm ITFS operations. We also sought suggestions of safeguards that would ensure that adequate equipment is timely installed. *Notice* at 974.

25. *Resolution.* As proposed, we will permit MDS and ITFS applicants to invoke the 0 dB protection standard with regard to pre-May 26, 1983, ITFS facilities where they will assure that equipment adequate to perform at that level of interference is available to the ITFS licensee at no expense. The ITFS commenters' primary concern appeared to be for the adequate protection of older ITFS systems which become subject to this new rule, especially that adequate equipment is promptly installed and that the existing operator does not incur costs, including any which might be incidental to installation of new equipment. Insufficient information was supplied upon which to base a standard to determine adequacy of an upgrade proposed to invoke the 0 dB standard, and we will solicit comment on this specific matter, as detailed in our companion *Further Notice* at paras. 14-16. In this regard, we note that new or modified transmission equipment may be specified instead of or in conjunction with reception or display equipment in some cases and that existing on-site equipment may be demonstrated to be sufficient in others.

26. Those parties that urge retention of the 10 dB standard because of the picture quality requirements of some course offerings or the congested nature of some markets fail to address the fact that we have already determined that a 0 dB standard is sufficient to ensure quality pictures where adequate modern equipment is in use.[23] Grant of any application requiring invocation of the 0 dB standard will be conditioned on the proffer and, where necessary, installation of new equipment for the existing ITFS licensee prior to commencement of operation on the new facilities, as suggested by several commenters. This provision will obviate the need to establish time limitations for completion of the upgrade, as suggested by some commenters. In addition, evidence of notification to the affected ITFS licensees regarding the upgrade proposal will be required. As a preliminary matter, we believe that where an applicant wishing to invoke a 0 dB standard makes a demonstration that improved equipment will operate in a manner which will make 0 dB appropriate, an ITFS licensee filing a petition to deny or an informal objection must give specific reasons why the upgrade is not practicable and provide documentation in support of its arguements. This will prevent ITFS entities from needlessly blocking introduction of an MDS system and will protect those licensees for whom the 10 dB protection standard may still be necessary. In the event that proposed modifications fail to perform in practice as anticipated, the MDS licensee will bear the burden of making whatever additional modifications are necessary.[24]

C. Point - to - Point ITFS Systems

27. *Background / Proposal.* Studio-to-transmitter link (STL) use of ITFS frequencies is licensed on a secondary basis; it is subject to displacement by an ITFS operator who proposes to use the channels in question for primary ITFS purposes. There is no corresponding provision, however, regarding ITFS STLs grandfathered on the E and F MDS channels. At present, therefore, an MDS operator cannot displace the operation of such STLs. In addition, ITFS licensees operate point-to-point relay stations and point-to-point primary operations on the E and F channels on a grandfathered basis. These operations are also not subject to displacement by MDS operators. Similarly, non-STL point-to-point operations on other ITFS channels are not generally subject to displacement.

28. In the *Notice,* we raised the issue of possible displacement with regard to each of these three different types of point-to-point ITFS operations. First, we proposed to permit an MDS licensee to displace ITFS STLs on E and F channels where suitable alternative spectrum is available, provided that the MDS licensee will pay the expenses of the migration. Second, we requested comment regarding whether we should do the same with respect to other point-to-point ITFS operations on the E and F channels. Third, we requested comment as to whether we should permit ITFS operators that would offer omnidirectional service to displace point-to-point ITFS operations on the same basis. *Notice* at 974.

29. *Resolution.* Most parties commenting on this issue support the proposal of the *Notice* for the displacement of grandfathered STLs, provided that suitable alternative spectrum is available and that the MDS licensee pays for the migration. Several parties also support the proposal to permit MDS displacement of primary point-to-point ITFS operations on the E and F channels and suggest safeguards similar to those they proposed for STL migration to ensure that suitable alternative spectrum is available. Commenters were divided regarding the proposal to permit new ITFS operations on ITFS channels to displace existing primary point-to-point ITFS operations. The overriding concern of commenters opposed to the proposals of the *Notice* is that no suitable alternative spectrum is avail-

able. Many commenters in support, as well as those opposed, urge that adequate safeguards be adopted to ensure that the party requesting the migration will pay all expenses, that service quality does not decline, that installation is timely, and that the new equipment is acceptable to the ITFS licensee.

30. Although commenters did not supply information regarding the extent of the various uses of point-to-point systems in ITFS, our own experience indicates that such ITFS operations are an impediment to the introduction of MDS stations in numerous areas. Any potential detriment to ITFS operations forced to migrate under the terms of a displacement provision, the primary source of opposition to the proposal, can be rendered negligible with appropriate protections. Where no suitable alternative spectrum exists, as asserted by several commenters, displacement simply will be rejected. Accordingly, we will provide for the ability of MDS operations to displace all point-to-point ITFS operations on the E and F channels, subject to conditions specified below.

31. Because suitability of spectrum in a given area depends on individualized factors such as location, terrain, and climate, the question of displacement should be determined on a case-by-case basis.[25] In all cases, however, the new spectrum must be licensable on a primary basis (unless an ITFS STL is moved to other ITFS spectrum, where it may remain secondary) and the change must not cause disruption in service. The MDS entity seeking displacement must include in its application engineering analyses for both the channels it seeks and the new channels to which it proposes to move the incumbent ITFS licensee.[26] Finally, the ITFS entity's new equipment must be delivered (and if preferred by the ITFS entity, it must be installed) before the MDS licensee commences operation on the abandoned channels. If these procedures and conditions are satisfied, the Commission will initiate whatever proceedings are demanded in each case to modify the existing point-to-point ITFS operator's license to specify the new facilities.

32. In reaching this determination to permit displacement of grandfathered ITFS point-to-point operations on the MDS channels, we reject the contentions of parties concerned that ITFS licensees will lose revenues if displaced and that some ITFS licensees may be effectively penalized for having designed and operated systems in adherence to the Commission's desire that systems be efficiently designed to use only as much spectrum resource as necessary to fulfill the specific needs of the operator. Operation on suitable alternative spectrum should have the same potential for accommodating the operations of existing ITFS facilities, and should not amount to a penalty in any other sense, as the quality of the service provided must be determined to be suitable before such a displacement will be approved. Similarly, neither the "legitimacy" nor the efficiency of point-to-point operations is denigrated by our action here, as asserted by some commenters. This action is taken in recognition of the simple scarcity of MDS spectrum for wireless cable service, and the need to make that spectrum available as widely as possible without detriment to existing ITFS operations.[27]

33. We will not provide for the displacement of point-to-point ITFS operations on the ITFS channels by omnidirectional proposals. Contrary to the argument of some commenters, point-to-point operations are not *per se* inefficient, but often permit simultaneous operation by multiple ITFS users on the same channels. Directional ITFS operation, with spectrum usage closely tailored to the licensee's needs, has long been promoted by the Commission. Displacement of such operations to other spectrum is likely to preclude additional point-to-point operations in many cases. Perhaps more importantly, such a policy would encourage new ITFS operators to propose facilities that far exceed their needs. We cannot find that displacement of point-to-point ITFS services on ITFS frequencies by omnidirectional ITFS services will provide inherently more valuable or desirable service, even though refusing to permit involuntary displacement in such circumstances may reduce, in some cases, the ITFS excess capacity that might be leased to wireless cable operators if such displacement were permitted.

D. ITFS Leases

34. *Background / Proposal.* Section 74.931(e) of the Commission's Rules provides that an ITFS licensee leasing excess capacity must preserve at least 40 hours per week on each channel for ITFS purposes, with at least 20 hours per week of the preserved time on each channel in actual use for ITFS programming before leasing is permitted. The 40 hours preserved for ITFS use must include at least six hours per channel per weekday (Monday through Friday) between 8:00 AM and 10:00 PM. The additional ten hours may be programmed during those hours or on Saturday from 8:00 AM through 10:00 PM. Similarly, the 20 hours of minimum operation must include at least three hours per weekday between 8:00 AM and 10:00 PM; the remaining five hours may be programmed during those hours or on Saturday between 8:00 AM and 10:00 PM. In addition, the *Second Report and Order* in MM Docket No. 83-523 stated that an ITFS licensee cannot surrender all future rights to recapture airtime as needed, and that ITFS leases may not exceed 10 years.[28] The former has been interpreted as a right of recapture over and above the specific 40-hour reservation. In the *Notice*, we asked whether these limitations on ITFS operators' leasing of excess capacity critically limit the utility of ITFS excess capacity to provide spectrum for a wireless cable system. We also sought comment as to whether the limitations served a protective function for ITFS licensees or unduly interfered with the freedom to contract. *Notice* at 975.

35. *Resolution.* Most commenters support retention of most or all of the current restrictions on the leasing of excess capacity of ITFS stations for non-ITFS use. Those commenters who do petition for change have not persuaded us that a substantial modification of our present restrictions is appropriate. For the most part, we believe that the restrictions are an important safeguard to ensure that ITFS channels remain primarily dedicated to the purpose for which they were allocated -- presentation of educational material for instructional use.[29] The current restrictions achieve this end while imposing the minimum necessary restriction on the secondary use of the channels and parties' freedom to contract for that secondary use. While some commenters strenuously argue the obvious, that ITFS excess capacity would be even more profitable and useful for the provision of wireless cable service if available for use with fewer restrictions, or none at all, they do not demonstrate that the current restrictions negate the utility of that capacity for non-ITFS purposes or prevent or discourage leasing. The lease restrictions are designed to preserve the integrity of the ITFS allocation

while maximizing their utility as components of a wireless cable system or other non-ITFS uses. They already provide for over 75 percent of airtime to be available for non-ITFS use, including the most desirable days and times of day. They permit extensive flexibility in scheduling, and allow for a gradual initiation of service on new facilities. Accordingly, the wholesale changes of the current lease restrictions urged by some parties will not be instituted here.

36. The arguments advanced by commenters seeking relaxation of the restrictions almost universally fail to recognize that the Commission allocated this spectrum to ITFS for the transmission of instructional and informational material, and that excess capacity usages are ancillary.[30] The appropriate allocation or reallocation of the spectrum is not at issue here. For example, WCA contends that the minimum ITFS usage requirement of 20 hours should be lifted and ITFS licensees be permitted to lease their entire capacity if they believe that the revenues derived from leasing are more valuable than the transmission capacity. Although this result would inarguably utilize ITFS spectrum to benefit educational institutions financially, that is not the purpose of the ITFS allocation. This portion of the scarce radio spectrum was allocated to enhance educational programs by providing space for radio transmission of educational materials. The commenters' position favoring any use of the spectrum that provides financial support as within the ambit of the allocations is fundamentally flawed, however beneficial such financial support for educational institutions may be. Such action would amount to a *de facto* reallocation of the spectrum, and the reallocation decision would be made in each case by an individual licensee on the basis of its own self-interest. In view of the current allocation, this effectively amounts to an abdication of the Commission's responsibility and a violation of the Communications Act. Any reallocation of the spectrum deemed necessary to meet the demands of wireless cable service or based on the level of ITFS utilization of the spectrum should be accomplished more directly through a formal allocation Rule Making, and such action is not a subject of this proceeding.

37. The same misperception is displayed, although less graphically, by parties who suggest that an ITFS licensee be able to consolidate its educational usage requirements on a single channel and lease remaining channels in their entirety. The per channel requirement is based on the premise that ITFS applicants should request only those facilities they need to fulfill their educational mission; if their educational programming can be accommodated on a single channel, they should not request additional channels. The same misperception is also apparent in the argument of some commenters that we should remove the time-of-day restrictions. Some note that schools can use ITFS facilities to tape programs in the early hours of the morning for later replay during the school day. However, libraries for such taped presentation of material can be readily assembled without the use of ITFS facilities, and such usage, standing alone, appears unredeemably wasteful of the spectrum.[31]

38. A few parties also complain that the 20-hour minimum ITFS usage per channel requirement prevents the development of new systems which may not be able to start out with that level of utilization and which need the revenues to be derived from leasing in order to develop their systems. The rule as written, permitting the institution of excess capacity usage when less than 40 hours per week is used on a channel for ITFS purposes, is intended to accommodate that gradual increase in service that would typify a fledgling ITFS operation. Generally, an institution that is unprepared to use its channels for even four hours a day should simply request fewer channels or wait until it is able to more fully utilize ITFS capacity before requesting it. We recognize, however, that strict adherence to this principle may, in practice, lead to an excessive balkanization of the ITFS spectrum in some areas. Accordingly, we will relax our rules to permit new entities to begin operations and lease excess capacity with a minimum of 12 hours of educational programming per channel per week for the first two years of operation. This will permit a grammar school, for instance, to introduce service for a little less than half of a typical school day at the outset. To provide added flexibility, such ITFS licensees will be permitted to count up to four hours of usage per day towards that requirement. Once the ITFS station has been in operation for two years, however, the 20-hour minimum will be enforced, and parties are required to notify the Commission of their compliance with the rule, demonstrated by a copy of their program schedule.[32] Licensees not in compliance may be required to reduce their channel allotment. We anticipate that in many cases, this relaxation of our leasing rules for new ITFS stations will stimulate ITFS expansion and facilitate the initation of new wireless cable systems.

39. A larger number of commenters urge us to eliminate our policy requiring that ITFS licensees retain a right to recapture airtime beyond the 40-hour minimum per channel per week specified in our rules. They argue that this "total recapture requirement" discourages investment in wireless cable by unnecessarily injecting uncertainty into the leasing process. The total recapture requirement is intended to recognize that in light of the perpetually changing educational landscape, ITFS licensees should not be required to predict irrevocably their spectrum needs far into the future. Because we will retain other leasing restrictions, however, we believe that the total recapture requirement is not necessary. For example, an ITFS licensee willing to forego the opportunity to provide for future expansion may do so only until the end of the 10-year lease term. Prudent licensees may reserve the right to make some adjustments after some period of time during the lease term, but we will not require that they do so.

40. Finally, we will retain the maximum lease term of 10 years. We continue to believe that a ten-year term provides the wireless cable operator with sufficient time to establish its system and permits the ITFS licensee to adjust to changing educational needs, particularly in the absence of the right to readily adjust its use of airtime beyond specific narrow limits within the license term.[33]

E. Channel Control by Cable Systems

41. *Background / Proposal.* In the *Notice*, we pointed out that it is currently permissible for cable systems[34] to operate OFS and MDS channels within their franchise areas. We recognized that cable system operators can use MDS channels to provide service in sparsely-populated areas but expressed concern whether such channels are being warehoused and underutilized. We solicited comment on whether we should prohibit or limit licensing or leasing of MDS and ITFS channels by a cable system within its franchised service area. *Notice* at 975.[35]

42. *Resolution*. This issue distills into an evaluation of the relative merits of two mutually exclusive benefits. On the one hand, use of MDS channels by cable system operators can and has resulted in expansion of service in less populated areas and can also increase system capacity within cabled areas without having to rebuild existing cable systems. On the other hand, such use eliminates the potential for a significant competitor to the incumbent cable system. While the enhancement of existing multichannel services is certainly a significant and desirable benefit, a greater benefit is found in the introduction of competition to existing multichannel services.[36] At this time, wireless cable service is one of the most imminent sources of such competition. Consequently, we will generally prohibit a cable operator, either directly or indirectly, from acquiring a license (either through an application for a new station, assignment of license, or transfer of control) or lease for an MDS station whose protected service area overlaps its franchise area, or a lease for use of an ITFS station whose transmitter is within 20 miles of any part of its franchise area, unless there is another cable system in that franchise area operating in a substantial portion of the protected service area of the proposed MDS station. This rule will be effective immediately upon publication in the Federal Register.[37] Cable operators will remain free to direct their experience and financial resources to wireless cable systems outside their franchise areas.

43. We find it appropriate to create an exception to this new ownership restriction in rural areas that would otherwise remain unserved by wireless cable, as some commenters have suggested. To avoid service delay to rural customers, we intend to permit cable companies to be granted licenses for wireless cable stations within certain rural portions of their franchise areas where no wireless cable operation exists, even if they are sole cable providers. We intend to base this exception on the parameters found in Sections 63.56 and 63.58 of our rules, which delineate the guidelines used to permit telephone companies to provide video programming in rural areas with fewer than 2,500 residents and in other locations unlikely to enjoy independent cable service. We believe it necessary, however, to institute procedural safeguards not included in those Sections to ensure that no wireless cable operator is already operating or plans to operate in that area. Accordingly, the cable operator applying under this exception will be required to submit an application including pertinent financial data, technical specifications, and other factors relevant to the operation of its system. That application will be placed on public notice for 30 days. If no non-cable party files an application pursuant to 47 C.F.R. § 21.31, and if the cable operator's application is otherwise acceptable, the application can be granted so that the cable operator will be permitted to operate a wireless cable station in that area. If a wireless cable applicant does respond to the public notice with a timely filed application, it will be entitled to consideration without regard to the cable operator's application. Upon grant of the wireless cable operator's application, the cable operator's application will be dismissed. Under such circumstances, we do not anticipate granting any extensions of time of the initial construction period. The specific guidelines to be followed in applying this exception will be developed in conjunction with the further Rule Making in this proceeding, and the exception will be codified in our rules at the conclusion of that proceeding. We also seek comment on the extent to which current licensees, conditional licensees, applicants, and lessees should be required to divest. *See Further Notice* at para. 20.

44. There is one more possible exemption which merits further consideration. With the development of locally produced channels of cable programming, there is a necessity of securing some means for local distribution of that programming, which is not carried on the standard broadcast signals, to multiple headends of a cable system. We seek comment on the circumstances under which such an exemption may be warranted, as well as the sufficiency of other spectrum for this purpose, in our companion *Further Notice* at para. 21.

F. Comband Technology

45. *Background*. Comband technology provides for the transmission of two separate and independent video signals on a single 6 MHz channel. In the *Notice*, we stated that use of this technology has been approved, subject to application to and prior approval by the Commission in individual cases, in both the ITFS and MDS services.[38] We noted that use of Comband transmissions on all channels would increase an operator's channel capacity from 13 full- time to 46 full-time channels (including the OFS H channels and presuming full cooperation by all local ITFS licensees) in addition to the 20 ITFS channels now potentially available on a part-time basis. We sought comment regarding the adequacy and availability of Comband technology and its potential impact on the other rules under consideration in this proceeding. *Notice* at 975.

46. *Discussion*. Most commenters question the feasibility of Comband technology as a source of additional channel capacity. They contend that it is expensive, is subject to picture degradation, and may lead to increased co- channel and adjacent-channel interference. They also note that Comband is, for the most part, not currently in use.[39] Other commenters would welcome widespread use of Comband and note that an alternative Comband-like technology may soon be available which is less costly than current Comband equipment and does not suffer the picture degradation encountered in Comband systems.

47. It was not and is not the Commission's intention to require the use of Comband transmission technology, as apparently feared by some commenters. There is nothing in our current rules to restrict use of Comband transmission by MDS or ITFS licensees, and we do intend, when possible, to accommodate the widest possible voluntary usage of this or any other technology that can achieve spectrum efficiencies of this nature. A licensee seeking to use Comband or similar technology must file an application to do so with the Commission. Because Comband and other such technologies are still in development, we will not make specific rule modifications at this time. The use of transmission technology that employs modulation techniques other than those specified in our rules, however, may not be readily grantable in the absence of technical analysis demonstrating the operative and interference effects of such transmissions.

III. SERVICE CAPABILITY IMPROVEMENTS

48. In this section, we modify or adopt a variety of technical and equipment standards in order to increase the service capabilities of wireless cable. These changes will enable a wireless cable operator to provide a package of consistently clear signals to as many subscribers as

possible within its service area. Specifically, we here modify our rules regarding permissible power limits and the standard used to measure output power, several equipment performance parameters, the use of signal boosters, and the availability of auxiliary spectrum and the CARS band. These modifications will improve the quality of both MDS and ITFS service. In most cases, however, we are grandfathering equipment currently in service to minimize the financial burden on existing licensees, especially ITFS licensees. We recognize that this grandfathering may, in some cases, preclude the introduction by other licensees of equipment conforming to the new standards, or may severely limit its effectiveness. In more extreme cases, the presence of older equipment may prevent the introduction of a new system that could be possible if all parties employed equipment conforming to the standards adopted here. Nonetheless, we are reluctant to jeopardize the continued operation of ITFS systems by introducing excessive financial burdens, and the rules adopted here should provide a variety of protections. One notable provision that will protect existing ITFS stations while providing an opportunity for licensees to take full advantage of the new performance standards will permit the involuntary replacement or improvement of equipment for ITFS stations where it will be done at no cost to the ITFS operator. Additionally, we are preserving ITFS entities' right to reasonable direct notification of changes by other licensees that can affect their operations.

49. Our rules anticipate the cooperation of all parties to accommodate new system designs and, should disputes arise, we expect parties to resolve them in a manner that maximizes service to the public. Historically, many such disputes have been settled privately and there is no reason to believe that this will not continue. In those cases where private negotiation fails, the Commission will consider applications which are dependent on improvement or modification of existing licensees' facilities where the applicant will assume the cost of necessary equipment improvements for all parties. We believe that these involuntary upgrades and other modifications will be of particular benefit to ITFS licensees operating with older equipment, whose facilities can be thereby improved at no cost to them. Not only will updated equipment preclude interference, but it will improve the quality of service provided by the ITFS station and may enable the ITFS licensee to expand its system. It should also permit the introduction of new systems, both MDS and ITFS, that would otherwise be precluded. Procedures for consideration and grant of applications involving involuntary station and equipment modifications will be developed in the further Rule Making undertaken in this proceeding. *Further Notice* at paras. 14-16.

A. Increase and Conform Power Limits

50. *Background / Proposal.* Our rules currently limit the maximum transmitter output power in the MDS and ITFS services to 10 watts. The same rules also provide for the authorization of up to 100 watts for an MDS station able to make a showing of need for increased power. (47 C.F.R. §§ 21.904(a), 74.935(b)). We determined the current MDS transmitter power limit of 10 watts by assuming a clear line of sight between the transmitter and receiver. On that basis, it was calculated that a station operating at 200 watts maximum equivalent isotropically radiated power (EIRP) could provide reliable service to subscribers located 15 miles from the transmitter.[40] Subsequent to that determination, a number of MDS entities filed applications for increased transmitter power in which they contend that 10 watts is insufficient to serve subscribers at that distance.[41] MDS operators have also claimed in other proceedings that frequency inversions, storms, and natural and manmade obstacles can severely attenuate the MDS signal.[42] To overcome such signal losses, we have often permitted MDS stations to operate at 100 watts. We proposed in the *Notice* to modify the rules to permit MDS and ITFS stations to routinely request a maximum of 100 watts without a showing of need. *Notice* at 975-76.

51. *Resolution.* Based on operators' reported experiences, the comments submitted in this proceeding, and our own analysis, we believe that a transmitter output power of 100 watts coupled with a 13 dBi gain antenna will improve the signal strength at a receiver 15 miles away by 10 dB. More specifically, we anticipate that the unobstructed signal level will produce a power flux density of -65.6 dBW/m^2 and signal to noise (S/N) ratio of 54 dB.[43] These increases will offset, to an effective extent, the influences of terrain and atmospheric losses and permit reliable service year-round to a reasonable percentage of a licensee's protected service area. Accordingly, we will allow such an increase in maximum transmitter output power for MDS and ITFS stations.[44] The revised power limitation will be expressed in terms of equivalent isotropically radiated power, as explained in the next section. Applicants will continue to be permitted to specify operation at lower power levels if adequate service can be provided.

52. Opposition to this proposal is primarily based on undue concern that increased power will lead to increased interference. A licensee will be permitted to increase power only if it can demonstrate that interference protection standards will be observed. Further, we emphasize that we do not intend to issue automatic approvals of power increases for new applicants or for existing stations. Nor will we automatically approve changes in antenna patterns or beamwidths. Moreover, the rule change will not prevent existing facilities from expanding or the introduction of new facilities, as claimed by some commenters in opposition. While new or expanded facilities may be required to operate in some instances with higher powered, more expensive equipment as a result of this rule change, this speculative and limited detriment does not outweigh the significant improvements in service which can result from increased power.

53. Entities seeking to increase power will therefore be required to file an application to do so pursuant to either Part 21 for MDS or Part 74 for ITFS, but will not be required to demonstrate a specific need for the proposed increase. Applicants for higher power will have to engage in the analysis and notification procedures with respect to ITFS operations, as described in Section II-B-2, paras. 21-23, *supra*, in addition to the analysis and service requirements of Section 21.902 of our rules. Moreover, the applications will be placed on public notice, and applicants must serve each of the stations required to be considered with a copy of the interference analysis at or before the time the application is filed with the Commission.

B. Output Power Standard

54. *Background / Proposal.* In the *Notice*, we proposed to change the method by which power is measured to specify transmitting station output power in terms of its

equivalent isotropically radiated power (EIRP), which is the power radiated from the antenna in a given direction relative to a theoretical isotropic antenna. We proposed a maximum EIRP of 2000 watts or 33 dBW, with an exception of 8000 watts (39 dBW) for directional antennas. In addition, we sought comment (and expressed reservations) regarding whether to apply the maximum directional power limitation to ITFS stations, as ITFS makes extensive use of highly directional beams that may exceed the maximum. *Notice* at 976.

55. *Resolution*. Commenters have overwhelmingly supported our conviction that EIRP is the most appropriate output power standard. Because of differences in transmitting equipment, the specification which is most appropriate is the one which includes every gain and attenuation in the transmission system, and provides the greatest flexibility in system design. EIRP takes into account transmitter output power, line losses, and the gain and directionality of the antenna itself. In addition, technology for measurement of EIRP has long been mature. Furthermore, given a knowledge of transmitter power, line losses and antenna gain characteristics, one can estimate EIRP quite accurately without taking measurements for the total system.[45]

56. In delineating an appropriate EIRP standard to correspond to the power levels determined to be appropriate in the previous section, we assume that modern omnidirectional antennas used in the ITFS and MDS services generally provide a gain of only 13 dBi. A combination of a 100 watt transmitter and a 13 dBi gain antenna results in an EIRP of 2000 watts or 33 dBW, and that standard will be adopted for omnidirectional antenna operations.[46] For stations using directional antennas, we will presume an antenna gain of no more than 19 dBi, and the maximum allowable EIRP will be 39 dBW. Individual operations will be limited by the following formula proposed in the *Notice* and supported by commenters:

Maximum allowable EIRP = 33 dBW + 10 log (360/beamwidth), where 10 log (360/beamwidth) $\leq$ 6 dB.

Only one party, WHRO-Norfolk, complained that 39 dBW would be insufficient to accommodate directional transmission requirements. It is expected that there will be few instances in which a new licensee could not fulfill its point-to-point transmission requirements within the 39 dBW limit. In those few cases, we will entertain waiver requests of the 39 dBW limit for ITFS stations on a case-by-case basis. Any such request must address interference potential and should analyze the potential that the proposal will limit future omnidirectional operations in the area. In adopting this limit we remind all MDS and ITFS applicants that we may order them to reduce their EIRP if harmful interference results.[47]

C. Interference Protection Standards

57. *Background / Proposal*. MDS licensees are currently allowed a 710 square mile service area (a fifteen-mile radius boundary for an omnidirectional antenna), within which they are entitled to protection against harmful interference, while ITFS licensees enjoy interference protection at each specified receive site, regardless of its distance from the transmitter.[48] In the *Notice*, we invited parties to comment on the appropriateness of each of these protection schemes and the need for conforming standards in the two services.[49] We also sought comment on the adequacy of the current MDS protected service area in light of the increased power output limits proposed, and on the antenna height and receive antenna reference pattern used in making interference calculations. *Notice* at 976-77.

58. *Resolution*. Predictably, MDS operators urge us to conform the interference protection schemes by adopting protected service areas for ITFS, while ITFS operators maintain the position that the current receive site protection in the rules best suits the needs of that service.[50] A few parties argue that all ITFS receive sites within fifteen miles of their transmitter should be entitled to protection whether or not they have been registered with the Commission. A few MDS parties argue that the protected service area should be defined by a signal strength contour,[51] so that individual protection areas would vary according to each individual station's performance characteristics.

59. The current interference protection standards for both MDS and ITFS will not be changed. As stated in the *Second Report and Order* in MM Docket No. 83-523[52] and recently reiterated in *Sherburne Wright Educational Technology Cooperative*,[53] a protected service area is fundamentally incompatible with the specific purpose and unique needs of ITFS. The educational mission of an ITFS station often requires transmission to sites in excess of 15 miles from the transmitter, and these sites must be protected consistent with the spectrum allocation. Conversely, in many cases, receive sites are clustered closer than 15 miles from the transmitter or are unevenly distributed in different directions, so that protection out to 15 miles in all directions would create zones of unused protection, which could preclude the introduction of ITFS services by other entities.

60. The receive site protection standard for ITFS stations can benefit, as well as hinder, MDS operations. While some ITFS stations may be entitled to protection beyond 15 miles in some directions, they are often entitled to protection at locations less than fifteen miles from their transmitter in other directions. Consequently, an MDS station may be able to propose operation that will meet our interference criteria from a location closer to an ITFS station than might be permitted if the ITFS station were entitled to protection for fifteen miles in all directions. For wireless cable lessees of ITFS stations, the same dichotomy exists. While their operation as lessees on particular channels may suffer interference within fifteen miles in cases where the ITFS licensee's receive sites are closely clustered to the transmitter, they will enjoy protection over a larger area than would be otherwise provided in cases where the ITFS licensee's receive sites are widely distributed. The argument of some commenters that this situation presents uncertainty to a lessee of ITFS facilities is simply unfounded. The interference protection afforded to and required to be provided by ITFS stations, and the associated constraints on system design or operation, are readily ascertainable.

61. We are not persuaded that it is advantageous for MDS to abandon the certainty of a uniform, specified geographic area as the protected service area and substitute a determination based on a signal strength contour. Substantial staff resources would need to be devoted to making the individual determination for each MDS station's protected service area, which includes weighing

specific technical characteristics and environmental factors. The Commission specifically rejected this concept in 1984, stating,

> We do believe, however, that there is a need to establish a protected service area boundary that is easy to use and understand so that the spectrum use rights of licensees are clear. Unlike calculated and measured contours, a fixed mileage boundary is easy to use and understand. For these reasons, we have concluded that the best way to define the boundary of the protected service area is in terms of a fixed distance from the transmitter.[54]

A calculation of signal strength contours would create difficulties for both the industry and the Commission, with resulting delays in delivering service to the public. Accordingly, we will not alter the 710 square mile definition of an MDS protected service area at this time.

D. Equipment Performance Standards

62. The following sections provide for modification of a variety of equipment performance standards designed to improve ITFS and MDS service and increase the number of new ITFS and MDS stations. We will require all new MDS and ITFS stations completing construction on or after November 1, 1991, to employ transmitters conforming to the new standard. Additionally, any licensee that replaces its existing equipment on or after that date must do so with equipment meeting these standards. Applicants with pending applications, permittees, or conditional licensees with incomplete projects should review the status of their projects to determine whether they will be completed before November 1, 1991, and make necessary application amendments accordingly. Pursuant to § 21.42(c) of the Commission's Rules, MDS licensees and conditional licensees may change to a conforming transmitter or modify their existing units without Commission approval if the replacement transmitter is type-accepted.[55]

1. Transmitter Tolerance

63. *Background / Proposal.* Section 74.961(a) of our Rules requires that all ITFS stations maintain the frequency of their visual carriers within 60 kHz of the assigned frequencies.[56] Sections 21.101(a) and 21.908(c) of our rules require that visual carrier be contained within 0.001% of the nominal frequency for channels 1, 2, and 2A, and within 0.005% of the nominal frequency for the E and F channels. In the *Notice*, we explained that we had already proposed to tighten the frequency tolerance for H channels, E and F channels, and channels 1, 2, and 2A transmitters to meet a visual carrier frequency tolerance of 1 kHz of the assigned frequency. *Notice* at 977 (citing *MDS Further Notice*, *supra*, at 16-17). Our intent in making such a proposal is to allow for frequency offsets to reduce cochannel interference. To provide for use of this technique, MDS and ITFS transmitters must maintain a frequency tolerance at least similar to that of broadcast television transmitters, *i.e.*, ± 1 kHz. We also requested comment regarding whether to extend this requirement to ITFS stations, and to limit the requirement to only new stations in each service.

64. *Resolution.* Most commenters support the proposal for modification of the transmitter frequency tolerance limitations for new MDS and ITFS stations, and it will be adopted as proposed. In the *MDS First Report and Order*, the Commission acknowledged the value of frequency offset techniques as a means of resolving cochannel interference problems, stating,

> The Commission has long been aware that controlling the offset between co-channel transmitters located in adjacent areas increases the level of undesired signal that can be tolerated by approximately 17 dB. That is, when the frequency offset between the transmitter is maintained at 10 kHz ± 1 kHz, a passable television picture (TASO Grade 3) will be available where the ratio of desired signal to undesired signal is 28 dB as contrasted with the 45 dB ratio required when the offset is not controlled. If the offset is maintained with ± 2 Hz (this is called a precise frequency offset), the required ratio is reduced another 6 dB to 22 dB.[57]

To achieve the degree of stability required for precise offset, as urged by one commenter,[58] an advanced (atomic controlled) oscillator would be necessary. While equipping transmitters with this type of oscillator would significantly reduce the potential for cochannel interference, the cost of the oscillator is substantial. In making our proposal, we understood that certain compromises must be struck in order to improve operating conditions for ITFS and MDS stations. One of our objectives is to avoid imposing technical changes that will drive up the costs of providing these services to the point it becomes economically infeasible to operate. The choice of ± 1 kHz stability will not yield maximum picture quality and interference protection, but will provide a reasonable level of cochannel interference protection and will allow for frequency offset as an engineering technique to place stations close together without significantly increasing the cost of transmitters.

65. Accordingly, the transmission equipment of new stations and stations installing replacement transmitters on or after November 1, 1991, will be required to maintain frequency within ± 1 kHz. We recognize this action will impose some additional costs on new ITFS and MDS licensees, but those costs are outweighed by the anticipated benefits of the rule modification. For example, we expect that this stricter frequency tolerance requirement will allow an increase in the number of stations in a geographical area, thereby providing a greater segment of the public improved access to a wider selection of educational and entertainment programming.

66. At present, our rules do not require that licensees use frequency offset, nor do they explicitly require that licensees proposing to use that technique file an application for authority to do so. We believe that benefits of the transmitter tolerance standards adopted here will be greatly enhanced by the use of frequency offset in many cases. We will therefore require that all licensees with equipment conforming to the transmitter tolerance standard adopted here, including licensees upgraded by other operators, use frequency offset where it is demonstrated to be necessary to avoid harmful interference with another existing or previously proposed system. We note that a frequency offset intended to avoid interference with one party could harm another or have other unanticipated undesirable results. Accordingly, any licensee requiring the use of frequency offset by its own and/or other stations will be required to analyze its effect on co-channel

stations with transmiters within 50 miles of any stations changing to frequency offset, and obtain Commission approval before implementation. This will ensure that both the Commission and potentially affected licensees will know the operational parameters of the station, and will permit the public to comment on the feasibility and merits of the station modification.

2. Out-of-Band Emissions

67. *Background / Proposal.* Existing rules regarding out-of-band emissions for MDS, ITFS and OFS require that emissions in the 2.1/2.5 GHz bands that fall beyond 3 MHz above or below the upper and lower edges of the assigned channel shall be attenuated no less than: (1) 30 dB for transmitters rated at less than 10 watts visual peak power output; and (2) 40 dB for transmitters rated at 10 watts or more. Having realized that these levels of out-of-band attenuation are insufficient to effectively reduce adjacent-channel interference, the Commission proposed in the *OFS Notice* and the *MDS Further Notice* to require that out-of-band frequencies more than 3 MHz removed from the upper and lower channel edges be attenuated 60 dB for new stations. *OFS Notice*, *supra*, at 3534; *MDS Further Notice*, *supra*, at 17. Responses in those proceedings, however, asserted that the Commission's proposal failed to address those emissions falling between the channel edges and the frequencies 3 MHz removed from either side. As a result, we suggested in the *Notice* a constant slope attenuation mask connecting the emission value at channel edge with the 60 dB figure at 3 MHz from the band edge. *Notice* at 977.

68. *Resolution.* With the ever-increasing utilization of ITFS and MDS spectrum, it is imperative that all reasonable measures be taken to enhance the efficiency with which this spectrum is used. The limited comments received on this issue generally supported our proposal, subject to the grandfathering of existing operations. A few commenters argued persuasively for even stricter requirements.

69. The *MDS First Report and Order* explained that a series of tests had been conducted by an MDS operator that found perceptible adjacent channel interference was eliminated when out-of-band emissions were attenuated 60 dB below the peak video power of the interfering transmitter.[59] Microband submits that its experience shows that a much sharper rolloff is necessary than that suggested by the Commission. We are persuaded that the attenuation proposed in the *Notice* would not adequately suppress out-of-band emissions between the band edges and ± 3 MHz, *e.g.*, at 0.5 MHz removed from the upper channel edge, and will adopt Microband's recommendation requiring attenuation of 38 dB (relative to peak visual carrier) at the channel edges and a gradual increase to 60 dB below the peak visual carrier at 1 MHz below the band edge and 0.5 MHz above the band edge.[60]

70. The record indicates that there is already some equipment in the field which meets these standards. This current availability, coupled with the long lead time we will provide for conformance to the new standard, should minimize the increase in the cost of transmitters to meet this rule. We agree with Microband that these minimal additional costs are a relatively small price to pay for new, interference-free, adjacent-channel service.

3. Aural Power Levels

71. *Background / Proposal.* In the *Notice*, we decided to review our rules regarding the permissible aural power levels for MDS and ITFS stations in light of growing use of adjacent channels in many areas. We postulated that the current minimum of 10 percent of the peak visual signal power may not be low enough to preclude the aural signal of one channel from interfering with the visual portion of the immediate upper adjacent channel. We therefore proposed to eliminate the minimum aural power requirements of §§ 21.904(d) and 74.935(d) to facilitate the development of adjacent channel operations and to allow MDS operators the freedom to determine their individual minimum aural power levels. We also proposed to establish a maximum aural power level of 10 percent of the peak visual signal power for MDS, ITFS and OFS stations. *Notice* at 977.

72. *Resolution.* No party opposes the establishment of a maximum aural power standard, and most commenters support the standard recommended by the Commission. The record is, however, devoid of any experimental data or detailed analysis upon which to base a final formulation. Obviously, there is some minimum which MDS, ITFS, and OFS stations must employ in order to provide an acceptable service. That minimum is likely to vary with the circumstance of individual stations. We therefore believe it appropriate to establish a maximum value for aural signal power adequate to render service in the most extreme conditions, and to permit individual licensees to set their own minimum levels. No commenter proposed a level greater than that recommended by the Commission (10 percent of the peak visual power of the transmitter), and that maximum permissible level will be adopted. The record established herein indicates that uses of aural power levels of that degree will be rare. Nonetheless, we believe that this rule change will give licensees the flexibility to adjust their aural power levels to accommodate any interfering conditions that may be present. By taking this approach, we should eliminate the adjacent channel interference concerns expressed by two commenters.[61] If interference does occur, however, we may require a licensee to reduce its power level.

73. The record indicates there exists older equipment incapable of aural signal power adjustments. In those cases, licensees may continue to use such equipment. However, should this equipment become a source of adjacent channel interference, the licensee will be required to accept equipment capable of signal power adjustments if offered by another party seeking to reduce adjacent channel interference.

74. Texas Wired Music requests that a special exception be made to the 45 dB cochannel interference standard of § 21.902 to permit a 20 dB desired-to-undesired signal strength ratio for MDS Channel 1 aural-only service. We find this exception to be unwarranted. Texas Wired Music claims that such an exception is appropriate because the aural-only carrier frequency corresponds with the carrier frequency for the aural portion of the standard 6 MHz video channel. More specifically, it argues that because a video signal can tolerate its own audio carrier with a signal strength of 7 dB below the video signal, it can withstand an undesired aural signal 20 dB below the desired aural carrier. It is not clear whether a transmitter operating at 100 watts used to provide aural-only service would preclude others from operating nearby cochannel systems, or whether the 20 dB standard employed for FM service is sufficient protection in the 2.0 GHz frequency

spectrum. The spectral density of an aural-only signal differs substantially from that of a visual signal. An aural signal operating at the same level as a visual signal is likely to extend well beyond the 15-mile protected service area, which could lead to additional interference concerns. Moreover, our records do not reflect a substantive number of single channel stations providing aural-only service. We believe that the best approach to accommodate the type of operation contemplated by Texas Wired Music is to consider each proposal on a case-by-case basis. Accordingly, any request to offer aural-only service employing a transmitter power greater than that specified in Section 21.902 must be accompanied by a detailed interference analysis which demonstates that the proposal is not likely to adversely affect co-channel or adjacent-channel stations with transmitters within 50 miles, as well as an assessment of the likelihood that the power increase may restrict the location of future co-channel and adjacent-channel stations in nearby areas.

4. Antenna Standards

75. *Background*. In conjunction with other technical issues raised in this proceeding, Microband has argued that hotels and apartment buildings typically install their antennas much higher than the 30-foot height assumed in the Commission's interference standard. It therefore proposes that newcomers be required to demonstrate that a proposed station will not cause harmful electrical interference to each building receive location in a service area, regardless of the height of the receiving antenna. Microband also requested in General Docket No. 80-113, as did commenters in this proceeding, that the standard reference antenna[62] be changed to a specific model with lower performance characteristics.

76. *Resolution*. We continue to believe, based on our experience, that 30 feet is representative of the vast majority of receive locations. Moreover, experience has shown that the 30-foot height currently used has provided for acceptable reception, even for non-residential locations.[63] Accordingly, we will continue to employ this standard. If the location most vulnerable to harmful electrical interference is a non-residential location, as Microband seems to contend, then the worst interference calculation would be based upon a representative configuration for such a location. This typically would involve an antenna with characteristics similar to those of the standard reference antenna used for interference calculations in the *First Report and Order*, but would likely involve a height greater than 30 feet for the receiving antenna. Nonetheless, it would be impractical to refer to the actual antenna configuration in every situation, and Commission resources do not permit such individualized calculations for all operators. We believe it more reasonable to choose a representative height to be universally applied. Although we could use the mean, median, or mode of the receive locations involved, such a standard would require an extensive survey of a continuously changing population.

77. We will also retain the current standard antenna. In the *MDS First Report and Order, supra*, the Commission recognized that the antenna on which interference calculations are based is no longer manufactured but stated, "[w]e do not believe this act is of any decisional significance since there are other antennas available with similar electrical characteristics."[64] While the Andrew MD2, which is used as a model for the standard receive antenna, is a higher quality antenna than is typically used for residential installations, it is representative of antennas used for installations at hotels and apartment buildings. We still find no need to use an antenna currently being manufactured because the standard antenna consists only of a collection of specified operational parameters, and does not necessarily refer to an existing antenna. The commenters have not demonstrated that the reference antenna standard specified in the *First Report and Order* is deficient for the purposes for which it is employed.

E. Signal Boosters

78. *Background / Proposal*. Occasionally, small portions of a station's service area may be precluded from reception by the shadowing effects of tall buildings, bridges, ground depressions, or other obstructions. Low-power, same-channel signal repeaters, or signal boosters, can often fill in such gaps. At present, our rules do not specifically cover signal boosters. Because we anticipate that the development of wireless cable systems will lead to an increase in booster use, we believe it necessary to define the parameters of acceptable signal booster operation to ease administrative burdens and enhance their utility, and to avoid technical problems in the future. For example, a wireless cable operator could use a booster to provide shadowed areas with all of its channels, whether licensed to it or leased from other licensees. For the latter class of channels, the question arises whether the booster should be licensed to the ITFS and MDS licensees or to the wireless cable operator leasing the facilities, and how the application process should operate. Similarly, we need to determine which party would be responsible for correcting any interference the booster might cause and what procedures should apply in the event of interference.

79. In the *Notice*, we proposed that signal boosters operate with a maximum EIRP of 18 dBW. We proposed to limit the physical location of an MDS booster to the protected service area of an MDS station, and we sought comment on an appropriate location specification for ITFS stations. We also proposed that boosters be certified the same way as all other transmission equipment. Finally, we proposed to require specific authorization to operate a booster and to require application, notification, and public notice prior to issuing such an authorization. *Notice* at 977-78.[65]

80. *Resolution*. Parties commenting on this issue overwhelmingly favor the use of signal boosters, and we agree that our rules should be modified to provide for their utilization. We are persuaded that signal boosters can work effectively to fill in shaded areas in an MDS service area resulting from the line-of-sight requirements for reception of these microwave signals. This capability can significantly affect the viability of an MDS licensee or wireless cable system, and directly affects potential viewers who are in shaded areas of such systems.

81. Nevertheless, such devices present a difficult balancing of considerations, not only from a regulatory point of view but also from the point of view of the device designer. The regulatory problem is to ensure that the booster does not generate excess EIRP, which could cause interference in the same or adjacent areas. The designer's problem conflicts with this regulatory requirement. If a small part of the radiated power from a booster feeds back into the receiving antenna, the output power will be increased, further increasing the input signal and causing a runaway oscillatory condition. It is therefore imperative that output signals be kept out of the input. The only

practical means apparent for doing this is to utilize high gain antennas with extremely low back and side lobes (high front-to-back ratio), with the antennas pointed as close to 180 degrees apart as possible. The resultant "pencil beams" prevent signal energy from feeding back and causing an oscillatory condition.

82. Thus, for the receiving antenna aimed at the signal from the main transmitter, the greater the gain (and consequently the narrower the beam), the better. For the transmitting antenna, however, increasing the gain increases the likelihood of interference to adjacent areas. As a result, a compromise must be reached which meets the regulatory objective and yet can avoid the unwanted oscillations. While we are reluctant to limit design options, we must protect adjacent areas against harmful interference. Accordingly, we will limit the EIRP from a booster to 18 dBW. This low power should be adequate, as signal boosters are limited in use to filling shaded areas within a protected service area, and will not be authorized to extend service beyond a protected service area.[66]

83. While several commenters contend that there should be little or no regulatory oversight of the use of boosters, they have failed to demonstrate that the potential for interference is so slight as to warrant such treatment. Consequently, a licensee intending to use a booster will be required to make application to and receive approval from the Commission. As is the case for a new main station, the applicant must provide a showing that no harmful electrical interference to other licensees and permittees will result. The applicant also must show that the power flux density at the edge of the protected service area does not exceed -75.6 dBW/m^2, the nominal power flux density at the edge of the protected service area. To further guard against interference, we will require that the physical location of an MDS signal booster be within the protected service area of the MDS station. Even with these limitations, interference might be introduced from a new angle. Accordingly, we will consider the installation of a booster a major modification and an applicant must submit interference analyses and service certifications pursuant to 47 C.F.R. § 21.902. The installing licensee should also follow the analysis and notification procedures with respect to ITFS operations detailed in Section II-B-2, paras. 21-23, *supra*, including analysis regarding service to co- and adjacent-channel stations within 50 miles of the booster location. We also conclude that boosters should be subject to FCC certification like all other transmission equipment, including main station transmitters. These procedures should help avoid costs of remedying interference after the fact, and the burden on wireless cable operators will be minimal.

84. Boosters may be applied for only by an MDS licensee, conditional licensee or applicant, by an ITFS licensee, permittee, or applicant, or by a third party with a fully executed lease agreement with an entity that would qualify for its own booster license under these criteria. We realize that a wireless cable operator may need to use several boosters within its system, and that following the above procedures for each individual booster could be expensive and time-consuming. A single applicant, therefore will be permitted to secure, if possible, a blanket consent from each party whose signal would be retransmitted. It can then file multiple and sequential applications which include the original consent statement, if that statement so provides. If an applicant proposes a system of boosters and some are unacceptable, we will not necessarily reject the entire system but could grant those applications which will not cause harmful interference. Similarly, if a consent statement is received for one channel group, or if an analysis indicates that the booster would cause harmful interference on some channels, the booster can be granted for operation on limited specific channels.

F. Access to Auxiliary Frequencies / CARS

85. *Background / Proposal.* In the *Notice*, we proposed to amend Section 74.832 of the Commission's Rules (47 C.F.R. § 74.832) to include MDS licensees in the list of entities eligible for low power auxiliary stations. [67] We also proposed to amend the eligibility provisions and/or definitions of Part 78 of the Commission's Rules to provide MDS licensees with access to cable television relay service (CARS) spectrum on an equal basis with cable systems.[68] *Notice* at 978.

86. *Resolution.* A principle we have stated in the past, "use of the microwave radio spectrum should be governed by type of use rather than type of licensee," is especially apt here.[69] Although low power auxiliary stations do not use microwave frequencies, we believe that the same rationale applies. If an MDS licensee chooses to produce original programming, it should be permitted to use these frequencies on the same basis as cable operators and other program producers. Accordingly, as overwhelmingly favored by commenters, we will amend Section 74.832 to include MDS licensees in the list of entities eligible for low power auxiliary stations.

87. Most commenters also favor extending CARS eligibility to MDS licensees on the same basis as cable operators, and because cable and wireless cable have similar needs for CARS, we will do so.[70] Although several cable interests urge us to restrict the use of CARS frequencies by wireless cable operators in a variety of ways, they offer no basis for the disparate treatment they propose. We believe that CARS will be useful to wireless cable operators for STLs, operation of mobile pickup stations, and all other uses currently authorized for cable operators. We are aware that the CARS band is crowded in some areas, but we believe that newcomers can be effectively engineered in with proper coordination and cooperation among operators.[71] In any event, such congestion is not a reason to exclude a particular segment of a group of similarly-situated candidates from access to the spectrum. In addition, the Commission's Rules provide for use of higher frequency bands for links of less than five miles, thereby alleviating some of the congestion in the CARS band. *See* 47 C.F.R. § 78.108. We emphasize that wireless cable operators will be afforded no greater right to CARS frequencies than cable operators, and we will not permit wireless cable operators to use the CARS band to provide service directly to subscribers. To be eligible to apply for CARS facilities, a wireless cable operator must hold an MDS license or conditional license or hold an executed lease agreement with an MDS licensee or conditional licensee or an ITFS licensee or permittee.

IV. OTHER ADMINISTRATIVE REQUIREMENTS

A. Application Filing Procedures

88. *Background / Proposal.* In the *Notice*, we sought comment on changing the filing procedures for MDS applications from the current public notice and cutoff period procedures of Section 21.31 of our rules (47 C.F.R. § 21.31). We also sought comment on reducing the cutoff period for ITFS applications from 60 to 30 or 45 days. *Notice* at 978.

89. *Resolution.* The few parties who adddressed the proposal in the *Notice* for MDS applications were fairly evenly divided. Commenters in support of the proposal submit that it will help ensure that only grantable applications are filed. WCA argues that the current procedures have created an incentive for insincere applicants to file competing applications to induce the legitimate wireless cable operator into a financial settlement. It asserts that mutually exclusive applications should only be considered timely-filed if they are received in a condition acceptable for filing by the close of business of the day in which the first-filed application is accepted for filing. On the other hand, some commenters assert that first-come, first-served procedures will discourage thoughtful engineering and will favor large entities with the resources necessary to mount an adequate engineering effort, thereby precluding newcomers from entering the wireless cable market.

90. Upon review of the comments received in this proceeding, and in view of our experience, we will adopt the following filing procedure: An MDS application for a particular service area which is in a condition acceptable for filing will be mutually exclusive with any other MDS application which is in a condition acceptable for filing for the same particular service area and frequency as defined in 47 C.F.R. § 21.31(a) *if* received by the Commission on the same calendar day as the first such MDS application is received by the Commission.[72] This rule change will be effective upon its publication in the Federal Register. We expect that such a change will eliminate the opportunity for application mills to "merely copy applications that have previously been filed and resubmit them with the names changed."[73]

91. We will retain current application procedures for ITFS service, as advocated by most of the commenters on this issue. We have previously observed that "[e]ducational institutions and organizations typically do not have expertise in filing for Commission licenses or an in-house staff of communications attorneys and engineers who can expeditiously prepare ITFS applications." *ITFS Second Order*, *supra*, at 73. We also observed that educational entities often need governmental or other authorization or funding before applying for ITFS facilities, and that additional time may be needed in some cases to negotiate a lease for excess channel capacity. *Id.* Most commenting parties continue to support these principles, and those opposed have failed to present compelling arguments for retreating from this position. The objection by a few commenters that the 60-day response period results in protracted proceedings for relatively insignificant requests is not well- founded. Requests that are truly insignificant will generally constitute minor modifications, not new applications or major modifications, so that the 60-day public notice rule does not apply.

92. Proposals aimed at revising our ITFS cutoff list procedures in lieu of reducing the length of their pendency will not be adopted. At present, cutoff lists are released as often as Commission resources permit. Applications that are not mutually exclusive with other applications are placed on an A cutoff list, while other applications are placed on a B cutoff list. It is not feasible to release overlapping A cutoff lists because there could be timely filed and mutually exclusive applications on each list, thereby linking the applications and producing conflicting cutoff dates. Moreover, the 60 days cannot run from the time notice is given that an ITFS application has been tendered for filing, as urged by some commenters, because an engineering analysis is necessary to determine interference potential and applicability to either the A or B cutoff list.

B. Annual Reports

93. *Background / Proposal.* Pursuant to Section 43.72 of the Commission's Rules (47 C.F.R. § 43.72) all MDS licensees operating as common carriers must file an annual report. Section 43.72 requires that such reports include, among other things, a balance sheet (subsection (a)(3)) and an income statement (subsection (a)(4)). If any subscriber is affiliated with or related to the carrier in any way, the rule also requires the MDS carrier to submit information about that subscriber (subsection (a)(6)). In addition, the rule requires statistical information regarding the total hours of programming in certain categories (subsection (a)(5)(iii)). We proposed in the *Notice* to eliminate the balance sheet, income statement, and affiliation information requirements, and to simplify the requirement regarding hours of service. We also sought comment as to whether the rule should be extended to MDS licensees that elect non-common carrier status and MDS lessees of ITFS facilities. *Notice* at 978.

94. *Resolution.* Based on the comments submitted, we will simplify the annual reporting requirements. We do not believe it appropriate to eliminate the requirement entirely. Simplified annual reports from all MDS licensees, including those operating as non-common carriers, can be a valuable tool for detecting anticompetitive practices, and can assist us in monitoring the development of wireless cable. In addition, the annual report is a valuable tool in the enforcement of the various "use-it-or-lose-it" provisions of Part 21. Accordingly, we will eliminate the balance sheet, income statement, and subscriber affiliation data requirements of Section 43.72. We will also modify subsection (a)(5)(iii) to require the total hours of transmission service rendered in the categories of (1) entertainment, (2) education and training, (3) public service, (4) data transmission, and (5) other services. If the operator retransmits programming received from a programming network, it may classify all such retransmitted programming as entertainment for annual reporting purposes.[74] Finally, for administrative convenience, we will move this rule to Part 21.[75]

C. Environmental Impact

95. *Background.* Under the terms of the National Environmental Policy Act of 1969, the Commission is required to determine whether the transmitters it licenses or authorizes significantly affect the "quality of the human environment." 42 U.S.C. § 4321 *et seq.* (1976). Since the emission of potentially hazardous radiofrequency (RF) radiation is one of several possible environmental effects,

the Commission has established rules for evaluating human exposure to RF radiation from FCC-regulated transmitters. 47 C.F.R. § 1.1307(b).[76] MDS and ITFS stations have heretofore been excluded from evaluation under § 1.1307(b) due to their low transmitter output power limitations, previously a maximum transmitter output power level of 10 watts.[77]

96. *Discussion*. In this *Report and Order*, we increase the maximum output power for MDS and ITFS stations. *See* Section III-A, paras. 51-53, *supra*. As a result, it is no longer justifiable to categorically exclude these stations from environmental processing for potential human exposure to RF radiation. We took similar action when we relaxed the power limitations for FM booster stations.[78] Like our decision in that situation, however, we believe that this requirement should not be extended to MDS or ITFS stations transmitting at relatively low power levels. Therefore, MDS or ITFS stations that transmit with an EIRP of 200 watts or less will continue to be categorically excluded from § 1.1307(b). Other MDS and ITFS stations must comply with § 1.1307(b). Guidelines for determining whether a non-excluded station is in compliance with the RF radiation rule can be obtained by reference to Technical Bulletin No. 65, published by the Commission's Office of Engineering and Technology.[79]

V. PROCEDURAL MATTERS

Final Regulatory Flexibility Analysis

I. Need and Purpose of this Action:

97. The action is taken to simplify and update, where possible, the disparate technical, procedural, ownership, and other requirements and restrictions applicable to MDS, OFS, and ITFS stations so as to facilitate wireless cable service.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

98. No comments were filed in response to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

99. The Commission considered allowing the for-profit sale of conditional licenses for which facilities have not been built. Several commenters argued that permitting such sales would expedite the introduction of new wireless cable services and reduce the cost of delivering wireless cable services to the public. We decline, for the present, to remove the restriction on for-profit sales of conditional license for which facilities have not been built because we are concerned that such action would encourage the filing of speculative applications and, on balance, delay and increase the cost of the introduction of service on MDS channels to the detriment of the viewing public. *See Second Report and Order* in Gen. Docket No. 80-112, 57 RR2d 943, 956-58 (1985).

100. The Commission also reviewed the possibility of relaxing certain limitations on the leasing of ITFS capacity, and decided to retain most of these requirements. We find that the ITFS leasing restrictions, for the most part, impose minimal hardship on the licensees who utilize ITFS channels for the educational purposes for which they are allocated.

101. The Commission also considered changing the interference protection standards for MDS and ITFS licensees, and concluded that the current parameters are appropriate.

102. Finally, in the *Notice*, the Commission proposed to reduce the cutoff period for ITFS applications from 60 days to 30 or 45 days. We decline to adopt this proposal because additional time may be necessary for an ITFS applicant to consult attorneys or engineers or to receive government funding or authorizations.

103. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

104. The rule changes adopted here have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose new or modified collection requirements on the public. This proposed change in the information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

VI. ORDERING CLAUSES

105. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), Parts 1, 21, 43, 74, 76, and 78 of the Commission's Rules, 47 C.F.R. §§ 1, 21, 43, 74, 76, and 78, ARE AMENDED as set forth in Appendix C, below.

106. IT IS FURTHER ORDERED that General Docket No. 80-113 IS TERMINATED.

107. IT IS FURTHER ORDERED that this *Report and Order* will be effective 30 days after publication in the Federal Register, except as follows:

(1) Sections 21.28(e), 21.901(d)(2), 21.912, and 21.914 of the Commission's Rules, 47 C.F.R. §§ 21.901(d)(2), 21.912, 21.914, are effective upon publication of a summary of this *Report and Order* in the Federal Register;[80]

(2) Sections 1.1307(b), 21.901(d)(1), 21.902(i), 21.905(c), 21.911, 21.913, 74.903(b)(1), 74.961(c), and 74.985 of the Commission's Rules, 47 C.F.R. §§ 1.1307(b), 21.901(d)(1), 21.902(i), 21.905(c), 21.911, 21.913, 74.903(b)(1), 74.961(c), and 74.985, are effective on January 24, 1991.

108. For further information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792, Lynne Milne, Common Carrier Bureau, (202) 634-1772, or Mike Lewis, Private Radio Bureau, (202) 632-6940.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Initial Comments

Alliance of Rural Wireless Cable Operators
Archdiocese of Los Angeles
Archdiocese of New York
Assn. for Higher Education of North Texas, *et. al* (Joint Educational Parties)
Assoc. of American Railroads
Assn. of Media-Based Continuing Education for Engineers (AMCEE)
Baypoint TV, Inc.
Cable Operators and Associations
California Amplifier
California State University-Bakersfield
Catholic Television Network
Citizens for Effective Public Policy
Columbia Communications, Ltd.
Comband Technologies
Conifer Corp.
Corporation for Public Broadcasting
Dioceses of Orange and San Bernadino, California
Diversified Cable, Ltd.
Educational Broadcasting Corporation
Evans Microwave, Inc.
Family Entertainment Network
Florida Community College-Jacksonville
Grand MMDS Alliance NY F/P Partnership
Hispanic Information and Telecommunications Network, Inc. (HITN)
HBO, Inc.
Ana G. Mendez Educational Foundation, *et. al* (Joint ITFS Parties)
ITS Corp.
Jones Intercable, Inc.
Kirkwood Community College
Louisiana State University
McCabe & Allen
Microband Companies, Inc.
Mitchell Communications Corp.
Multimedia Cablevision, Inc.
National Cable Television Assn. (NCTA)
National ITFS Assn. (NIA)
National Telephone Cooperative
New Mexico Public Broadcasting Corporation
Pacific Bell & Nevada Bell
Rocky Mountain Corporation for Public Broadcasting
Roman Catholic Communications Corp. of the Bay Area (RCCC)
San Diego State University
Arizona Board of Regents, *et. al* (ITFS Licensees)
Secure Business Communications
Southwestern Bell
St. Petersburg Junior College
Supreme Cable Co., Inc.
Tangent TV Cable Co.
Tele-Communications, Inc.
TIA Mobile Communications Division
Texas Wired Music, Inc.
United States Telephone Assn.
University of Maryland (UM)
University of Southern California (USC)
Vermont Television Cooperative
WCTV-Tampa
WHRO-Norfolk
Wichita State University (WSU)
WJCT-Jacksonville
Wireless Cable Association (WCA)

APPENDIX B

Parties Filing Reply Comments

Archdiocese of Los Angeles
Arizona Board of Regents, *et. al* (ITFS Licensees)
Assn. for Higher Education of N. Texas, *et. al* (Joint Educational Parties)
Catholic Television Network
Higher Education Parties
Hispanic Information and Telecommunications Network
HBO, Inc.
Hon. Lee Hamilton
Hon. Larry Pressler
Hon. Bob Traxler
Huston Tillotson College
Joint ITFS Parties
KLVX-Channel 10
Long Beach Unified School District
McCabe & Allen
Minnesota Public Radio, Inc.
National Cable Television Assn.
National ITFS Assn.
Network for Instructional TV, Inc. (NITV)
New York State Catholic Conference
Rocky Mountain Corporation for Public Broadcasting
Samaritan Foundation
San Juan College

Frederick Spaulding, P.E. (consulting engineer)
Spectrum Warehousing Attack Team (SWAT)
Supreme Cable Co., Inc.
Tele-Communications, Inc.
United States Catholic Conference
University of Maryland
University of Nevada
WCTV-Tampa
Western Wireless
Wireless Cable Association

APPENDIX C

Rule Changes

Parts 1, 21, 43, 74, and 78 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

109. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4 (i), 4 (j), and 303 (r) of the Communications Act of 1934, as amended, 47 U. S. C. §§ 154 (i), 154 (j), and 303 (r).

110. Section 1.227 is amended by revising paragraph (b)(4) to read as follows:

§ 1.227 Consolidations.

* * * * *

(b) * * *

(4) This paragraph applies when mutually-exclusive applications subject to Section 309(b) of the Communications Act are filed in the Private Radio Services or when there are more such applications for initial licenses than can be accommodated on available frequencies. In such cases, the applications either will be consolidated for hearing or designated for random selection (*See* § 1.972). An application which is substantially amended (as defied by § 1.962(c)) will, for the purpose of this section, be considered to be a newly-filed application as of the receipt date of the amendment. Except for applications filed under Part 94, Private Operational Fixed Microwave Service, mutual exclusivity will occur if the later application or applications are received by the Commission's offices in Gettysburg, PA (or Pittsburgh, PA for applications requiring the fees set forth at Part 1, Subpart G of the rules) in a condition acceptable for filing within 30 days after the release date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing or within such other period as specified by the Commission. For applications in the Private Operational Fixed Microwave Service, mutual exclusivity will occur if two or more acceptable applications that are in conflict are filed on the same day.

* * * * *

111. Section 1.1307, paragraph (b), is amended by revising Note 1 to read as follows:

§ 1.1307 Actions which may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

NOTE 1: Paragraph (b) shall apply to facilities and operations licensed or authorized under the following Parts of the Commission's Rules: 5, 21 (Subpart K), 25, 73, 74 (Subparts A, G, I, and L), and 80. With respect to Part 21 (Subpart K) and Part 74 (Subpart I), paragraph (b) is applicable only to MDS and ITFS stations transmitting with an equivalent isotropically radiated power (EIRP) in excess of 200 watts. With respect to Part 74 (Subpart L), paragraph (b) is applicable only to FM booster stations with a transmitter output power in excess of 10 watts. With respect to Part 80, paragraph (b) is applicable only to ship earth stations. Facilities and operations licensed or authorized under all other Parts, Subparts, or Sections of the Commission's Rules shall be categorically excluded from consideration under paragraph (b).

* * * * *

PART 21 -- DOMESTIC PUBLIC FIXED RADIO SERVICES

112. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 4 and 303, 48 Stat. 1066, 1982, as amended, 47 U. S. C. §§ 154, 303, unless otherwise noted.

113. Section 21.2 is amended by modifying the definition for "Repeater station" and by adding definitions for "Equivalent Isotropically Radiated Power" and "Signal booster station," to read as follows:

§ 21.2 Definitions.

* * * * *

Equivalent Isotropically Radiated Power (EIRP). The product of the power supplied to the transmitting antenna and the antenna gain in a given direction relative to an isotropic antenna radiator. This product may be expressed in watts or dB above 1 watt (dBW).

* * * * *

Repeater station. A fixed station established for the automatic retransmission of radiocommunications received from one or more stations and directed to a specified receiver site.

* * * * *

Signal booster station. A low-power repeater station automatically retransmitting on the same frequency as the received signal, and located within the protected service area of a Multipoint Distribution Service station.

* * * * *

114. Section 21.13 is amended by revising paragrph (a)(6) to read as follows:

§ 21.13 General application requirements.

(a) * * *

(6) Show compliance with the special requirements applicable to each radio service and make all special showings that may be applicable (*e. g.*, those required by §§ 21.100(d), 21.700, 21.706, 21.900, 21.912, 21.913, etc.).

* * * * *

115. Section 21.20 is amended by revising paragraph (b)(9) to read as follows:

§ 21.20 Defective applications.

* * * * *

(b) * * *

(9) The application is filed after the cutoff date prescribed in §§ 21.31 or 21.914 of this Part; or

* * * * *

116. Section 21.28 is amended by adding paragraph (e) to read as follows:

§ 21.28 Dismissal and return of applications.

* * * * *

(e) The Commission will dismiss an application filed by a cable television company which fails to comply with the provisions of § 21.912.

117. Section 21.30 is amended by revising paragraph (a)(4) to read as follows:

§ 21.30 Opposition to applications.

(a) * * *

(4) Except as provided in § 21.901(d)(1) regarding Instructional Television Fixed Service licensees, be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto, or identifying the tentative selectee of a random selection proceeding in the Multichannel Multipoint Distribution Service (unless the Commission otherwise extends the deadline); and

* * * * *

118. Section 21.33 is amended by correcting the word "changes" in paragraph (b) to read the word "chances," and by revising paragraph (a) to read as follows:

§ 21.33 Grants by random selection.

(a) If an application for a license in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of § 21.31, the applicants may be included in the random selection process set forth in Part 1, §§ 1.821, 1.822, and 1.825. If an application for a license in the Multichannel Multipoint Distribution Service (MMDS) is mutually exclusive with another such application and satisfies the requirements of §§ 21.31 and 21.914, the applicants may be included in the random selection process set forth in Part 1, §§ 1.821, 1.822, and 1.824. Renewal applications shall not be included in a random selection process.

* * * * *

119. Section 21.41 is amended by revising paragraph (c)(1)(i) to read as follows:

§ 21.41 Special processing of applications for minor facility modifications.

* * * * *

(c) * * *

(1) * * *

(i) in all radio services other than Multipoint Distribution Service and Digital Electronic Message Service, any increase in transmitter output power is less than three dB over the previously authorized output power; and in Digital Electronic Message Service, any increase in transmitter output power is one and one-half dB or less over the previously authorized output power; and in the Multipoint Distribution Service, any increase in EIRP is one and one-half dB or less over the previously-authorized power value.

* * * * *

120. Section 21.101 is amended by adding footnote 6 to the column titled "Frequency range (MHz)" in the table in paragraph (a) to read as follows:

§ 21.101 Frequency tolerance.

(a) * * *

2,110 to 2,200[6] 2,200 to 12,200[2,4,6]

* * * * *

[6] Beginning November 1, 1991, equipment authorized to be operated in the frequency bands 2150-2162 MHz and 2596-2644 MHz for use in the Multipoint Distribution Service shall maintain a frequency tolerance within ± 1 KHz of the assigned frequency.

* * * * *

121. Section 21.107 is amended by revising footnote 1 to the table in paragraph (b) to read as follows:

§ 21.107 Transmitter power.

* * * * *

(b) * * *

[1] In the 2,150-2,162 MHz and 2,500-2,690 MHz frequency bands, when used for the Multipoint Distribution Service, EIRP up to 2000 watts may be authorized pursuant to § 21.904.

* * * * *

122. Section 21.901 is amended by revising paragraphs (d)(1) and (d)(2) to read as follows:

§ 21.901 Frequencies.

* * * * *

(d) * * *

(1) Each applicant for facilities in the 2596-2644 MHz frequency band must:

(i) submit with its application an analysis demonstrating that operation of the applicant's transmitter will not cause harmful interference to any existing co-channel or adjacent-channel Instructional Television Fixed Service (ITFS) station with a transmitter site within 50 miles of the Multichannel Multipoint Distribution Service (MMDS) applicant's proposed transmitter site;

(A) This analysis may presume the displacement or discontinuation of a co-channel, grandfathered ITFS station, if such displacement or discontinuation is necessary for an analysis demonstrating the applicant's transmitter will not cause harmful interference to such ITFS station.

(B) This analysis may presume the displacement of any point-to-point operation of an ITFS station if such displacement or discontinuation is necessary for an analysis demonstrating the applicant's transmitter will not cause harmful interference to such ITFS station.

(C) In the alternative, an applicant for an MDS station on the E or F channels may submit a statement from the ITFS licensee stating that the ITFS licensee does not object to operation of the MDS station.

(ii) serve a copy of the analysis described in (i) on the licensee of each co-channel or adjacent-channel ITFS station with a transmitter site located within 50 miles of the MMDS applicant's proposed transmitter site;

(iii) include in its application a certification of service demonstrating that, on or before the filing date of the application, a copy of the analysis described in (i) was sent, certified mail, return receipt requested, to each licensee of a co-channel or adjacent-channel ITFS station with a transmitter site located within 50 miles of the MMDS applicant's proposed transmitter site; and

(iv) file with the Commission on or before the 20th day after the filing date of the application a written notice which contains the following:

(A) caption -- ITFS Service Notice;

(B) applicant's name, address, proposed service area and channel group(s);

(C) a list of each licensee of a co-channel or adjacent-channel ITFS station with a transmitter site within 50 miles of the MMDS applicant's proposed transmitter site;

(D) a notation of the date each such ITFS licensee received a copy of the analysis described in (i) of this subsection, or a notation of lack of receipt by the ITFS licensee of a copy of the interference analysis as of such 20th day.

(v) Within 90 days of the day of filing of the MDS application, for each such ITFS licensee for which there is a notation of the lack of receipt of the analysis described in (i) of this subsection, the MDS applicant must submit a demonstration prior to grant of its application that it made diligent efforts for the ITFS licensee to receive the analysis.

(vi) Within 90 days of the day of filing of the MDS application, for each such ITFS licensee for which there is a notation in the ITFS Service Notice of the lack of receipt of the analysis described in (i) of this subsection, and the ITFS licensee receives the analysis on or after the 20th day after the application filing date, the MDS applicant must submit a demonstration prior to grant of its application that the ITFS licensee received the analysis.

(vii) Notwithstanding the provisions of § 21.31(a)(4), any licensee of an existing co-channel or adjacent-channel ITFS station with a transmitter site within 50 miles of the MDS applicant's proposed transmitter site may file a petition to deny the application for an MDS station on the E or F channels within 90 days of the day of filing of the MDS application with the Commission. In the alternative, the ITFS licensee may file such petition to deny within 60 days of its receipt of the analysis described in (i) of this subsection.

(A) Except for the requirements as to the filing time deadline, this petition to deny must otherwise comply with the provisions of § 21.30.

(B) In addition, the ITFS licensee must demonstrate in its petition to deny that it made efforts to reach agreement with the MDS applicant but was unable to do so and

must demonstrate by interference analysis that operation of the proposed MDS station on the E or F channels will cause harmful interference to its ITFS station. In cases where the MDS application is dependent on modification(s) to the ITFS facility, the ITFS licensee must demonstrate that the harmful interference cannot be avoided by the proposed substitution of new or modified equipment to be supplied and installed by the MDS applicant, at no expense to the ITFS licensee.

(C) The subject matter of this petition to deny filed by the ITFS licensee is limited to raising objections concerning the potential for harmful interference to its ITFS station or concerning a failure by the MDS applicant for the E or F channels to serve the ITFS licensee with a copy of the analysis described in subsection (i).

(2) Each applicant for facilities in the 2596-2644 MHz frequency band may submit only a single application for the same channel group in each service area. The stockholders holding more than one percent of an entity's stock, the partners, the owners, the trustees, the beneficiaries, the officers, the directors, or any other person or entity holding a similar cognizable interest in one applicant for a service area and channel group, directly or indirectly, must not have a cognizable interest, directly or indirectly, in another applicant for that same service area and channel group.

* * * * *

123. Section 21.902 is amended by revising paragraphs (f)(2) and (i) and by adding paragraph (j) to read as follows:

§ 21.902 Frequency interference.

* * * * *

(f) * * *

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level. Harmful interference will be considered present when a free space calculation determines that this ratio is less than 0 dB. In the alternative, harmful interference will be considered present for an Instructional Television Fixed Service (ITFS) station constructed before May 26, 1983, when a free space calculation determines that this ratio is less than 10 dB, unless the license for a Multipoint Distribution Service station in the 2596-2644 MHz frequency band is conditioned on the proffer to the affected ITFS station licensee of equipment capable of providing a ratio of less than 0 dB at no expense to the ITFS station licensee, and also conditioned, if necessary, on installation of such equipment, absent a showing by the affected ITFS station licensee demonstrating good cause and that the proposed equipment will not provide a ratio of less than 0 dB or that installation of such equipment, at no expense to the ITFS station licensee, is not possible.

* * * * *

(i) If the initial application for facilities in the 2596-2644 frequency band was filed on September 9, 1983, an applicant proposing to modify such facilities must include with its modification application:

(1) an analysis demonstrating that the modification will not increase the size of the geographic area suffering harmful interference within the protected service area of existing or proposed co-channel or adjacent-channel facilities in the 2596-2644 MHz frequency band with a transmitter site within 50 miles of the modifying station's transmitter site if the initial application for the interfered-with station was filed on September 9, 1983; and

(2) an analysis demonstrating that the modification will not cause harmful interference to any new portion of the protected service area of existing or proposed co-channel or adjacent-channel facilities in the 2596-2644 frequency band with a transmitter site within 50 miles of the modifying station's transmitter site, if the initial application for the interfered-with station was filed on September 9, 1983.

(j) If an initial application for facilities in the 2596-2644 frequency band was filed on September 9, 1983, a licensee proposing to modify a constructed station may request exclusion from the interference analysis prescribed at Sections 21.902(c)(1) and (2) with respect to another specified application for E or F channel facilities, if the modifying licensee files as part of its modification application a demonstration that:

(A) the MDS application for which exclusion is requested was proposed by an initial application filed on September 9, 1983;

(B) the MDS application for which exclusion is requested is not yet perfected by the submission of the information necessary for processing, as of the date of filing of the modification application; and

(C) a copy of the licensee's modification application, including the demonstration specified in this subsection, was served on the MDS applicant for which exclusion is requested, on or before the date of filing of the modification application.

124. Section 21.904 is revised in its entirety to read as follows:

§ 21.904 Transmitter power.

(a) The maximum equivalent isotropically radiated power (EIRP) of a transmitter station in this service shall not exceed 2000 watts (33 dBW) except as provided in paragraph (b) of this section.

(b) If a station uses a transmitting antenna with a non-omnidirectional horizontal plane radiation pattern, the maximum equivalent isotropically radiated power (EIRP) in dBW in a given direction shall be determined by the following formula:

EIRP = 33 dBW + 10 log (360/beamwidth) [where 10 log (360/beamwidth) ≤ 6 dB].

Beamwidth is the total horizontal plane beamwidth of the transmitting antenna system in degrees, measured at the half-power points.

(c) An increase in station transmitter power, above currently-authorized or previously-proposed values, to the maximum values provided in subsections (a) and (b) of this section, may be authorized, if an applicant demonstrates that the requested power increase will not cause harmful interference to any authorized or previously-proposed co-channel or adjacent-channel station with a transmitter site within 50 miles of the applicant's transmitter site, or if an applicant demonstrates that:

(1) a station, that must be protected from interference, potentially could suffer interference that would be eliminated by increasing the power of the interfered-with station; and

(2) that the interfered-with station may increase its own power consistent with the rules; and

(3) the applicant requesting authorization of a power increase agrees to pay all expenses associated with the increase in power to the interfered-with station.

(d) For television transmission if the authorized bandwidth is 4.0 MHz or more for the visual and accompanying aural signal, the peak power of the accompanying aural signal must not exceed 10 percent of the peak visual power of the transmitter. The Commission may order a reduction in aural signal power to diminish the potential for harmful interference.

125. Section 21.905 is amended by adding paragraph (c) to read as follows:

§ 21.905 Emissions and bandwidth.

* * * * *

(c) Any licensee of a station in the 2150-2162 MHz or 2596-2644 MHz frequency bands, after notice and opportunity for hearing, may be required to use the frequency offset technique to avoid or to minimize harmful interference to another licensed station in the 2150-2162 MHz and 2596-2644 MHz frequency bands or to make other changes as provided in Sections 21.100, 21.107, 21.900, 21.901, 21.902, 21.904, 21.905(a), 21.905(b), 21.906, 21.907, and 21.908.

126. Section 21.908 is revised in its entirety to read as follows:

§ 21.908 Television transmitting equipment.

(a) Except as otherwise provided in this section, the requirements of paragraphs (a), (b), (c), (d) and (e) of § 73.687 of this chapter shall apply to stations in this service transmitting standard television signals.

(b) On or after November 1, 1991, the maximum out-of-band power of a transmitter operating in the frequency bands 2150-2162 MHz and 2596-2644 MHz shall be attenuated 38 dB relative to the peak visual carrier at the channel edges and constant slope attenuation from this level to 60 dB relative to the peak visual carrier at 1 MHz below the lower band edge and 0.5 MHz above the upper band edge. All out-of-band emissions extending beyond these frequencies shall be attenuated at least 60 dB below the peak visual carrier power. However, should harmful interference occur as a result of emissions outside the assigned channel, additional attenuation may be required. A transmitter licensed prior to November 1, 1991, that remains at the station site initially licensed, and does not comply with this subsection, may continue to be used for its life if it does not cause harmful interference to the operation of any other licensee. Any non-conforming transmitter replaced after November 1, 1991, must be replaced by a transmitter meeting the requirements of this subsection.

(c) The requirements of § 73.687(c)(2) will be considered to be satisfied insofar as measurements of operating power are concerned if the transmitter station is equipped with instruments for determining the combined visual and aural operating power. However, licensees must maintain the operating powers within the limits specified in § 21.904. Measurements of the separate visual and aural operating powers must be made at sufficiently frequent intervals to insure compliance with the rules, and in no event less than once a month.

(d) Television transmitting equipment designed for stations whose authorized bandwidth in 4 MHz or less for the visual and accompanying aural signal is subject to the provisions of § 21.101 with respect to the frequency tolerance of the visual and aural carriers. Such equipment is also subject to paragraphs (a) and (b) of this section, except that the provisions of § 73.687(a), (b), and (c)(1) of this chapter shall not apply.

(e) As a further exception to the other requirements of this section, transmitting equipment characteristics may vary from these requirements to the extent necessary to insure that transmitted information is not likely to be received in intelligible form by unauthorized subscribers or licensees, provided such variations permit recovery of the transmitted information without perceptible degradation as compared to the same information transmitted without such variations.

127. Section 21.911 is added to read as follows:

§ 21.911 Annual reports.

(a) No later than March 1 of each year for the preceding calendar year, each licensee in the Multipoint Distribution Service shall file with the Commission two copies of a report which must include the following:

(1) Name and address of licensee;

(2) Station(s) call letters and primary geographic service area(s);

(3) The following statistical information, preferably in tabular form, for the licensee's station (and each channel thereof);

(i) the total number of separate subscribers served during the calendar year;

(ii) the total hours of transmission service rendered during the calendar year to all subscribers;

(iii) the total hours of transmission service rendered during the calendar year in the following categories: entertainment, education and training, public service, data transmission, and other services;

(iv) a list of each period of time during the calendar year in which a station was not operational due to removal or alteration of equipment or facilities; and

(v) A list of each period of time during the calendar year in which the station rendered no service as authorized, if the time period was a consecutive period longer than 48 hours.

(b) The licensee, by an appropriate corporate officer, controlling partner, or individual proprietor, must certify this report as to the accuracy and completeness of the information contained therein.

(c) A copy of each year's report shall be retained in the principal office of the licensee and shall be readily available to the public for reference and inspection.

128. Section 21.912 is added to read as follows:

§ 21.912 Cable television company eligibility requirements.

(a) Notwithstanding the provisions of Section 21.900 of this part, initial or modified authorizations for stations in the 2150-2162 MHz and 2596-2644 MHz frequency bands may not be granted to a cable television company if a portion of the Multipoint Distribution Service (MDS) station's protected service area is within the cable television company's franchise area, unless that cable television company is not the sole provider of cable television service in the franchise area. No cable television company may acquire such an authorization either directly, or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company.

(b) No licensee of a station in this service may lease transmission time or capacity to a cable television company either directly, or indirectly through an affiliate owned, operated, controlled by, or under common control with a cable television company, if a portion of the Multipoint Distribution Service (MDS) station's protected service area is within the cable television company's franchise area.

(c) Applications for new stations, station modifications, assignment, or transfer of control by cable television companies for stations in the 2150-2162 and 2596-2644 MHz frequency bands shall include a showing that no portion of the protected service area of the proposed MDS station is within the franchise area of the cable television company or of any entity indirectly affiliated, owned, operated, controlled, or under common control with the cable television company.

NOTE 1: (A) As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the Multipoint Distribution Service (MDS) station applicant or licensee and the cable television company.

(B) Examples of situations in which an MDS applicant or licensee will be deemed to be controlled or to have a relationship include, among others:

(1) if one is the debtor or creditor of the other;

(2) if they have a common officer, director, or other employee at the management level;

(3) if there is any element of ownership or other financial interest by one in the other; and

(4) if any person or company has a financial interest in both.

NOTE 2: In applying the provisions of this section to the stockholders of a corporation which has more than 50 stockholders:

(A) Only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

(B) Stock ownership by an investment company, as defined in 15 U.S.C. § 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirecIty owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated. If an investment company directly or indirectly owns voting stock in an intermediate company which in turn directly or indirectly owns 50 percent or more of the voting stock of the corporation, the investment company shall be considered to own the same percentage of outstanding shares of such corporation as it owns of the intermediate company: *Provided, however*, That the holding of the investment company need not be considered if the intermediate company owns less than 50 percent of the voting stock, but officers or directors of the corporation who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

(C) In cases where record and beneficial ownership of voting stock is not identical (*e. g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties), the party having the right to determine how the stock will be voted will be considered to own it for the purposes of this section.

129. Section 21.913 is added to read as follows:

§ 21.913. Signal booster stations.

(a) Authorizations for Multipoint Distribution Service (MDS) booster stations may be granted to an MDS applicant, conditional licensee or licensee, to an Instructional Television Fixed Service (ITFS) applicant, permittee or licensee, or to a third party with a fully-executed lease agreement with an MDS or ITFS applicant, conditional licensee, permittee, or licensee. A signal booster station may not extend service beyond the boundaries of an MDS station's protected service area. No boostser station may be authorized for the retransmission of signals from an MDS, ITFS, or OFS station without the written consent of the licensee of the station whose signals are retransmitted.

(b) In addition to the other application requirements of this Part and of Form 494, each application for a signal booster station that would retransmit an MDS signal must include a demonstration that the proposed booster station site is within the protected service area of the MDS station.

(c) In addition to the other application requirements of this Part and of Form 494, each application for a signal booster station that would retransmit an MDS signal must include a demonstration that the power flux density at the edge of the MDS protected service area does not exceed -75.6 dBW/m2.

(d) In addition to the other application requirements of this Part and of Forms 494 and 330, each application for a signal booster station must include a demonstration that the proposed booster station will cause no harmful interference to co-channel and adjacent-channel existing or previously-proposed ITFS and MDS stations with transmitters within 50 miles of the proposed booster station's transmitter site.

(e) In addition to the other application requirements of this Part and of Forms 494 and 330, each application must include a written consent statement of the licensee of each MDS, ITFS, and OFS station whose signal is retransmitted.

(f) The output power of the signal booster transmitter station must not exceed 18 dBW EIRP.

130. Section 21.914 is added to read as follows:

§ 21.914 Mutually-exclusive MDS applications.

Notwithstanding the provisions of subsections 21.31 (b)(2)(i) and (ii), to be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications, an application for frequencies at 2150-2162 MHz or 2596-2644 MHz must be received by the Commission in a condition acceptable for filing on the same calendar day as the first of the conflicting applications is received by the Commission in a condition acceptable for filing.

PART 43 -- REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

131. The authority citation for Part 43 continues to read as follows:

Authority: Sec. 4, 48 State. 1066, as amended; 47 U. S. C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U. S. C. 211, 219, 220.

132. Section 43.72 is removed and reserved.

PART 74 -- EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

133. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U. S. C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U. S. C. 301, 303, 307.

134. Section 74.832 is amended by adding paragraph (a)(6) to read as follows:

§ 74.832 Licensing requirements and procedures.

(a) * * *

(6) Licensees and conditional licensees of stations in the Multipoint Distribution Service and Multichannel Multipoint Distribution Service as defined in Section 21.2, or entities that hold an executed lease agreement with an MDS or MMDS licensee or conditional licensee or with an Instructional Television Fixed Service licensee or permittee.

* * * * *

135. Section 74.901 is amended by adding definitions for "Equivalent Isotropically Radiated Power," "Point-to-point ITFS station," and "Studio to transmitter link" to read as follows:

§ 74.901 Definitions.

* * * * *

Equivalent Isotropically Radiated Power (EIRP). The product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna radiator. This product may be expressed in watts or dB above 1 watt (dBW).

* * * * *

Point-to-point ITFS station: An ITFS station that transmits a highly directional signal from a fixed transmitter location to a fixed receive location.

* * * * *

Studio to transmitter link (STL): A directional path used to transmit a signal from a station's studio to its transmitter.

* * * * *

136. Section 74.902 is amended by adding new paragraph (h) to read as follows:

§ 74.902 Frequency assignments.

* * * * *

(h) On the E and F-channel frequencies, a point-to-point ITFS station may be displaced by an MDS licensee, provided that suitable alternative spectrum is available and that the MDS licensee bears the expenses of the migration.

137. Section 74.903 is amended by revising paragraph (a)(2) to read as follows:

§ 74.903 Interference.

(a) * * *

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the antenna input terminals of the affected receiver, when the ratio is less than 0 dB, except in cases where the stations were constructed before May 26, 1983. In such cases, the desired to undesired signal ratio shall not be less than 10 dB unless the individual receive site under consideration has been subsequently upgraded with up-to-date reception equipment, in which case the ratio shall not be less than 0 dB. Absent information presented to the contrary, the Commission will assume that reception equipment installation occurred simultaneously with original station equipment.

* * * * *

138. Section 74.911 is amended by revising paragraph (a)(1) to read as follows:

§ 74.911 Processing of ITFS station applications.

(a) * * *

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. These applications are subject to the provisions of paragraph (c) of this section. A major change for an ITFS station will be any proposal to add new channels, change from one channel (or channel group) to another, or increase transmitter output power. However, the Commission may, within 15 days after the acceptance of an application, or 15 days after the acceptance of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change, and subject to the provisions of paragraph (c) of this section.

* * * * *

139. Section 74.931 is amended by revising paragraph (e) to read as follows:

§ 74.931 Purpose and permissible service.

* * * * *

(e) A licensee may use excess capacity on each channel to transmit material other than the ITFS subject matter specified in paragraphs (a), (b), (c), and (d) of this section subject to the following conditions:

(1) The licensee must preserve at least 40 hours per week, including at least 6 hours per weekday (Monday through Friday), excluding holidays and vacations days, for ITFS purposes on that channel. The 40-hour preservation may consist of airtime strictly reserved for ITFS use and not used for non-ITFS programming, or of time used for non-ITFS programming but subject to ready recapture by the licensee for ITFS use with no economic or operational detriment of the licensee. At least 20 hours per week of the preserved time on each channel must be used for ITFS programming, including at least 3 hours per weekday, excluding holidays and vacation days, except that for the first two years of operation, an ITFS entity may lease excess capacity if it uses at least 12 hours per channel per week for ITFS programming, including up to four hours of ITFS usage per day. Only ITFS programming and preserved airtime scheduled between 8:00 a.m. and 10:00 p.m., Monday through Saturday, will qualify to meet these requirements.

(2) All of the capacity available on any subsidiary channel of any authorized channel may be used for the transmission of material to be used by others.

(3) When an ITFS licensee makes capacity available on a common carrier basis, it will be subject to common carrier regulation. A licensee operating as a common carrier is required to apply for the appropriate authorization and to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is a common carriage rests with the ITFS licensee. Initial determinations by the licensees are subject to Commission examination and may be reviewed at the Commission's discretion.

(4) Leasing activity may not cause unacceptable interference to co-channel and adjacent-channel operations.

(5) No licensee of a station in this service may lease transmission time or capacity to any cable television company either directly, or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company, if the ITFS station is within 20 miles of the cable television company's franchise area.

* * * * *

140. Section 74.935 is revised to read as follows:

§ 74.935 Power limitations.

(a) The maximum equivalent isotropically radiated power (EIRP) of a transmitter station in this service shall not exceed 2000 watts (33 dBW) except as provided in paragraph (b) of this section.

(b) If a station uses a transmitting antenna with a non-omnidirectional horizontal plane radiation pattern, the maximum equivalent isotropically radiated power (EIRP) in dBW in a given direction shall be determined by the following formula:

EIRP = 33 dBW + 10 log (360/beamwidth) [where 10 log (360/beamwidth) ≤ 6 dB].

Beamwidth is the total horizontal plane beamwidth of the transmitting antenna system in degrees, measured at the half-power points.

(c) an increase in station transmitter power, above currently-authorized or previously-proposed values, to the maximum values provided in subsections (a) and (b) of this section, may be authorized, if an applicant demonstrates that the requested power increase will not cause harmful interference to any authorized or previously-proposed co-channel or adjacent-channel station with a transmitter site within 50 miles of the applicant's transmitter site, or if an applicant demonstrates that:

(1) a station, that must be protected from interference, potentially could suffer interference that would be eliminated by increasing the power of the interfered-with station; and

(2) that the interfered-with station may increase its own power consistent with the rules; and

(3) the applicant requesting authorization of a power increase agrees to pay all expenses associated with the increase in power to the interfered-with station.

(d) For television transmission, the peak power of the accompanying aural signal must not exceed 10 percent of the peak visual power of the transmitter. The Commission may order a reduction in aural signal power to diminish the potential for harmful interference.

141. Section 74.936 is amended by revising paragraphs (b) and (c) and adding new paragraph (d) to read as follows:

§ 74.936 Emissions and bandwidth.

* * * * *

(b) On or after November 1, 1991, the maximum out-of-band power of a transmitter operating in this service shall be attenuated 38 dB relative to the peak visual carrier at the channel edges and constant slope attenuation from this level to 60 dB relative to the peak visual carrier at 1 MHz below the lower band edge and 0.5 MHz above the upper band edge. All out-of-band emissions extending beyond these frequencies shall be attenuated at least 60 dB below the peak visual carrier power. However, should interference occur as a result of emissions outside the assigned channel, additional attenuation may be required. A transmitter licensed prior to November 1, 1991, that remains at the station site initially licensed, and does not comply with this subsection, may continue to be used for its life it it does not cause harmful interference to the operation of any other licensee. Any non-conforming transmitter replaced after November 1, 1991, shall be replaced by a transmitter meeting the requirements of this subsection.

(c) The requirements of § 73.687(c)(2) will be considered to be satisfied insofar as measurements of operating power are concerned if the transmitter is equipped with instruments for determining the combined visual and aural operating power. However, licensees are expected to maintain the operating powers within the limits specified in § 74.935. Measurements of the separate visual and aural operating powers must be made at sufficiently frequent intervals to insure compliance with the rules, and in no event less than once a month.

(d) As a further exception to the other requirements of this section, transmitting equipment characteristics may vary from these requirements to the extent necessary to insure that transmitted information is not likely to be received in intelligible form by unauthorized subscribers or licensees, provided such variations permit recovery of the transmitted information without perceptible degradation as compared to the same information transmitted without such variations.

142. Section 74.938 (b) is removed and paragraph (a) is redesignated accordingly.

143. Section 74.950 is amended by revising paragraph (b) to read as follows:

§ 74.950 Equipment performance and installation.

* * * * *

(b) The overall attenuation characteristics of the transmitter may vary from those specified in § 73.687 of this chapter, provided that the provisions of § 74.936 are met. However, care should be exercised in the adjustment of the transmitter to insure correct overall response of the transmitter for proper transmission of the upper and vestigal lower sideband.

144. Section 74.961 is revised to read as follows:

§ 74.961 Frequency tolerance.

(a) Beginning November 1, 1991, the frequency of the visual carrier shall be maintained within ± 1 KHz of the assigned frequency at all times when the station is in operation. Until that date, the frequency of the visual carrier shall be maintained within 60 KHz of the assigned frequency at all times when the station is in operation. A transmitter licensed prior to November 1, 1991, that remains at the station site initially licensed and does not comply with this paragraph may continue to be used for its life it it does not cause harmful interference to the operation of any other licensee. Any non-conforming transmitter replaced after November 1, 1991, must be replaced by a transmitter meeting the requirements of this paragraph.

(b) For television transmission, the peak power of the accompanying aural signal must not exceed 10 percent of the peak visual power of the transmitter.

(c) Any licensee with transmission equipment conforming to the transmitter tolerance standard of this section can be required to use frequency offset where it is demonstrated to be necessary to avoid harmful interference with another station.

145. Section 74.985 is added to read as follows:

§ 74.985 Signal booster stations.

(a) Authorizations for Instructional Television Fixed Service (ITFS) booster stations may be granted to an ITFS applicant, permittee or licensee, or to a third party with a fully-executed lease agreement with an ITFS applicant, permittee, or licensee. The eligibility requirements of § 74.932 will not apply to such third-party booster station applicants. No booster station may be authorized for the retransmission of signals from an ITFS station without the written consent of the licensee of the station whose signals are retransmitted.

(b) In addition to the other application requirements of this Part and of Form 330, each application for a signal booster station must include a demonstration that the proposed booster station will cause no harmful interference to co-channel and adjacent-channel existing or previously- proposed ITFS and MDS stations with transmitters within 50 miles of the proposed booster station's transmitter site.

(c) In addition to the other application requirements of this Part and of Form 330, each application must include a written consent statement of the licensee of each ITFS station whose signal is retransmitted.

(d) The output power of the signal booster transmitter station must not exceed 18 dBW EIRP.

PART 78 -- CABLE TELEVISION RELAY SERVICE

146. The authority citation for Part 78 continues to read:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U. S. C. 152, 153, 154, 301, 303, 307, 308, 309.

147. Section 78.3 is revised to read as follows:

§ 78.3 Other pertinent rules.

Other pertinent provisions of the Commission's rules and regulations relating to the cable television relay service (CARS) are included in the following parts of this chapter:

Part 0 -- Commission Organization.

Part 1 -- Practice and Procedure.

Part 2 -- Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

Part 17 -- Construction Marking and Lighting of Antenna Structures.

Part 21 -- Domestic Public Fixed Radio Services.

Part 74 -- Experimental, Auxiliary, and Special Broadcast, and Other Program Distribution Services.

Part 76 -- Cable Television Service.

148. Section 78.5 is amended by adding paragraph (j) to read as follows:

§ 78.5 Definitions.

* * * * *

(j) *Other eligible system.* A system comprised of microwave radio channels in the Multipoint Distribution Service and Multichannel Multipoint Distribution Services (as defined in § 21.2), and, on a part-time basis, in the Instructional Television Fixed Service (as defined in § 74.901) that delivers multichannel television service over the air to subscribers.

149. Section 78.11 is amended by revising paragraphs (a), (c), (d), (e), (f), and (g) to read as follows:

§ 78.11 Permissible service.

(a) CARS stations are authorized to relay TV broadcast and low power TV and related audio signals, the signals of AM and FM broadcast stations, signals of instructional TV fixed stations, and cablecasting intended for use by one or more cable television systems or other eligible systems. LDS stations are authorized to relay television broadcast and related audio signals, the signals of AM and FM broadcast stations, signals of instructional television fixed stations, cablecasting, and such other communications as may be authorized by the Commission. Relaying includes retransmission of signals by intermediate relay stations in the system. CARS licensees may interconnect their facilities with those of other CARS, common carrier, or television auxiliary licensees, and may also retransmit the signals of such CARS, common carrier, or television auxiliary stations, provided that the program material retransmitted meets the requirements of this paragraph.

* * * * *

(c) CARS station licenses may be issued to cable television owners or operators or other eligible system owners or operators, and to cooperative enterprises owned by cable television owners or operators or other eligible system owners or operators. Television translator licensees may be members of such cooperative enterprises.

(d) CARS systems shall supply program material to cable television systems, other eligible systems, and translator stations only in the following circumstances.

(1) Where the licensee of the CARS station or system is owner or operator of the cable television systems or other eligible systems supplied with program material; or

(2) Where the licensee of the CARS station or system supplies program material to cable television systems, other eligible systems, or television translator stations either without charge or on a non-profit, cost-sharing basis pursuant to a written contract between the parties involved which provides that the CARS licensee shall have exclusive control over the operation of the CARS stations licensed to him and that contributions to capital and operating expenses are accepted only on a cost-sharing, nonprofit basis, prorated on an equitable basis among all cable television systems or other eligible systems being supplied with program material in whole or in part. Charges for the programming material are not subject to this restriction and cable network-entities may fully charge for their services. Records showing the cost of the

service and its nonprofit, cost-sharing nature shall be maintained by the CARS licensee and held available for inspection by the Commission.

(e) The license of a CARS pickup station authorizes the transmission of program material, and related communications necessary to the accomplishment of such transmission, from the scenes of events occurring in places other than a cable television studio or the studio of an other eligible system, to the studio, headend, or transmitter of its associated cable television system or other eligible system, or to such other cable television or other eligible systems as are carrying the same program material. CARS pickup stations may be used to provide temporary CARS studio-to-headend links, studio-to-transmitter links, or CARS circuits consistent with this part without further authority of the Commission: *Provided, however,* That prior Commission authority shall be obtained if the transmitting antenna to be installed will increase the height of any natural formation or manmade structure by more than 20 feet and will be in existence for a period of more than 2 consecutive days: *And provided, further,* That if the transmitting equipment is to be operated for more than 1 day outside of the area to which the CARS station has been licensed, the Commission, the Engineer in charge of the district in which the station is licensed to operate, and the Engineer in charge of the district in which the equipment will be temporarily operated shall be notified at least 1 day prior to such operation. If the decision to continue operation for more than 1 day is not made until the operation has begun, notice shall be given to the Commission and the relevant Engineers in charge within 1 day after such decision. In all instances, the Commission and the relevant Engineers in charge shall be notified when the transmitting equipment has been returned to its licensed area.

(f) A cable network-entity may use CARS stations to transmit their own television program materials to cable television systems, other eligible systems, other cable network-entities, broadcast stations, and broadcast network-entities: *Provided, however,* that the bands 1990-2110 MHz, 6425-6526 MHz and 6875-7125 MHz may be used by cable network-entities only for CARS pick-up stations.

(g) The provisions of paragraph (d) of this section and § 78.13 shall not apply to a licensee who has been licensed in the CARS service pursuant to § 21.709 of this chapter, except that paragraph (d) of this section shall apply with respect to facilities added or cable television and other eligible systems first served after February 1, 1966.

150. Section 78.13 is amended by adding paragraph (d) to read as follows:

§ 78.13 Eligibility for license.

* * * * *

(d) Licensees and conditional licensees of channels in the Multipoint Distribution Service and Multichannel Multipoint Distribution Service as defined in Section 21.2, or entities that hold an executed lease agreement with an MDS or MMDS licensee or conditional licensee or with an Instructional Television Fixed Service licensee or permittee.

151. Section 78.27 is amended by revising paragraph (a) to read as follows:

§ 78.27 License conditions.

(a) Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in the Cable Television Relay Service to serve cable television systems and other eligible systems, shall contain the condition that cable television systems shall operate in compliance with the provisions of Part 76 (Cable Television Service) of this chapter and that other eligible systems shall operate in compliance with the provisions of Part 21 and Part 74 of this chapter.

* * * * *

152. Section 78.33 is amended by revising paragraph (b) to read as follows:

§ 78.33 Special temporary authority.

* * * * *

(b) Special temporary authority may also be requested to conduct a field survey to determine necessary data in connection with the preparation of a formal application for installation of a radio system under this part. Such authority may be granted to equipment suppliers and others who are not operators of cable television systems or other eligible systems, as well as to cable operators or other eligible system operators, to conduct equipment, program, service, and path tests.

* * * * *

FOOTNOTES

[1] General Docket No. 90-54 also includes issues raised and comments filed in PR Docket No. 88-191, which was terminated by action of February 8, 1990. *Report and Order* in PR Docket No. 88-191, 5 FCC Rcd 1220.

[2] *Notice of Proposed Rule Making and Notice of Inquiry* in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 971 (1990) (*Notice*).

[3] A total of 60 parties filed initial comments in this proceeding, and 33 parties filed reply comments. These commenters included educational institutions, cable operators, wireless cable operators, telephone companies, members of Congress, and other interested parties. A list of parties filing initial comments is attached as Appendix A; a list of parties filing reply comments is attached as Appendix B.

[4] In this Order, "MDS" will generally be used to refer collectively to single-channel and multiple-channel MDS. The use of "MMDS" will specifically refer to that individual service in those cases where the distinction is significant. Single-channel MDS will be referred to as such, where appropriate.

[5] The channels available for wireless cable include two single-channel MDS channels (Channels 1 and 2, or in some cases Channels 1 and 2A), eight MMDS channels (Channels E1-E4 and F1-F4), three OFS channels (Channels H1-H3), and 20 ITFS channels (Channels A1-A4, B1-B4, C1-C4, D1-D4, and G1-G4). The A and B channels are interleaved; that is, the

channels alternate in sequence A1, B1, A2, B2, A3 . . . etc. The C and D channels are similarly interleaved, with C1 adjacent to B4, as are are the E and F channels, with E1 adjacent to D4. The G and H channels are similarly interleaved, but there is no channel H4; instead, the response channels (associated with each primary channel for interactive audio communications) are adjacent to G4.

[6] *Further Notice of Proposed Rule Making* in Gen. Docket No. 90-54, FCC 90- 342, adopted October 11, 1990. (*Further Notice*), at paras. 5-6.

[7] 47 C.F.R. § 21.901(d)(2); *First Report and Order* in Docket No. 19671, 86 FCC 2d 299, 309 (1981), *aff'd* , *Memorandum Opinion and Order* in Docket No. 19671, 99 FCC 2d 715, 725 (1983). At present, it is possible for one entity to hold licenses for either or both of the MDS single channels (1 and 2 or 2A), one H channel, and either the four E or four F channels in the same service area.

[8] We also eliminate the one-to-a-market restriction on ownership of the OFS H channels, as proposed in the *Notice*. *Notice* at 972.

[9] The elimination of the ownership limitations is a substantive rule change which relieves a restriction, and therefore can be made effective on less than 30 days' notice. *See* 5 U.S.C. § 553(d)(1). In any event, we find good cause for making the rule change effective upon publication in the Federal Register. By doing so, we hope to conform this rule with the one-day MDS application filing procedure adopted in this *Report and Order*. *See* paras. 88-90, *infra*.

[10] Our consideration of this issue, and certain others as indicated, reflects the views set forth in our recent *Report* to Congress on the Provision of Cable Television Service and the comments filed in conjunction with that inquiry. *Report* in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990).

[11] Construction permits are no longer issued for MDS stations. Construction authority is granted in the form of a conditional license, a license conditioned upon completion of station construction within a specified period of time and upon filing a certification of completion of construction by a specified date. *Report and Order* in CC Docket No. 86-128, 2 FCC Rcd 5713 (1987).

[12] *See, e.g.*, 47 C.F.R. § 73.3597(c)(2); *Transfer of Broadcast Facilities*, 52 RR2d 1081 (1982), *recon. denied*, 98 FCC2d 991 (1985); *TV - 8, Inc.*, 62 RR2d 580 (1987).

[13] *See* 47 C.F.R. §§ 21.39(a), 21.29(e). MMDS licensees and conditional licensees that were authorized after a random selection process in which they received a preference are not permitted to transfer or assign their interests until the subject station has been in operation for one year. 47 C.F.R. § 21.39(a)(1). That rule is not modified here.

[14] In 1983, the E and F channels were reallocated from the ITFS to the MDS service, and a filing deadline of September 9, 1983, was established for those channels. *First Report and Order* in Gen. Docket No. 80-112, 94 FCC2d 1203 (1983).

[15] We note that the rule change promulgated in this Order is limited to initial-round MMDS stations that cause harmful interference to other initial-round MMDS stations. We emphasize that the policies adopted here do not affect an MMDS station's obligations concerning ITFS operations, as apparently misapprehended by some commenters.

[16] This rule change becomes effective on January 24, 1991. Any MDS application for the E and F channels filed after that date must comply with this rule change. Any MDS application for the E and F channels filed between October 11, 1990, and January 24, 1991, must be amended no later than January 25, 1991, to include the ITFS interference analysis specified in this *Report and Order*. The applicant must mail the copies no later than January 25, 1991, and must file the written notice as to receipt of ITFS analysis no later than February 15, 1991. MDS applicants for the E and F channels filing before October 11, 1990, must file the specified ITFS interference analysis and notification after a conditional license is granted, but before construction commences.

[17] Such analysis may, of course, expressly presume the displacement or discontinuation of a grandfathered ITFS system operating in the same area on the channels for which application is made, where such displacement or discontinuation is a predicate for the introduction of MDS service on those channels.

[18] Although we here eliminate the ITFS consent requirement, we reiterate our observation in the *Notice* that the MDS applicant will in most instances be well-served by efforts to secure such statements, since they would simplify engineering analysis of their proposals and would expedite Commission action.

[19] In cases where service of the notification and analysis occurs after the 20-day period for advisement to the Commission, the staff will extend the time for response by an ITFS station, generally to provide at least 60 days.

[20] The notification should be addressed to an agent for service, if any is specified in the ITFS station's file. We remind ITFS licensees, permittees, and applicants of their obligation to keep a current address on file for each of their facilities. The provision for permitting MDS applicants to document unsuccessful service attempts will prevent an MDS applicant from being unfairly impeded by an ITFS entity's failure to keep a current address on file, although the requirement that the MDS applicant make diligent efforts to notify affected ITFS parties does not end with the Commission's application files and license files. Of course, before authorization for a new station or modification of an existing station is granted, we will review any interference analysis submitted to independently determine whether harmful interference will result, thereby minimizing the prospect that failure to effect notification will jeopardize affected ITFS entities' right to protection from harmful interference.

[21] In its petition, the ITFS entity must allege that it made efforts to reach agreement with the MDS entity but was unable to do so and must demonstrate by interference analysis that the proposed MDS station will cause harmful interference to its station. Of course, an affected ITFS entity may also file a petition if it was not served with a copy of the engineering analysis.

[22] We emphasize that in establishing multichannel MDS in 1983, we stated that "[o]ne of our primary concerns in making this reallocation is to ensure that no existing ITFS operation experiences unacceptable degradation in service as a result of the operation of a multichannel MDS station." *First Report and Order* in Gen. Docket No. 80-112, 94 FCC2d 1203, 1262 (1983).

[23] *See* 47 C.F.R. § 74.903(a)(4). In addition, the Joint ITFS Parties argue that the 0 dB standard is only satisfactory where the interfering station is operating with an aural carrier signal level of no more than -15 dB of the visual carrier signal level. We have established 10 percent of the peak visual power of the transmitting station as the maximum permissible aural power level, and this should be sufficient to address the stated concern. In cases of harmful interference, however, we may require a licensee to reduce its power. *See* Section III-D-3, para. 72, *infra*.

[24] WCA argues that most of the ITFS reception equipment installed prior to May 26, 1983, is capable of operating interference-free, and submits that where an applicant can show that an older ITFS receive site has such equipment on hand, that applicant should only be required to protect that site to 0 dB. No

analytical support is provided for this argument, and we are not persuaded that 0 dB protection is adequate for pre-May 26, 1983, equipment in most situations. An MDS entity seeking to invoke the 0 dB protection standard while specific analysis guidelines are under consideration in this proceeding may proffer or demonstrate the existence of post-May 26, 1983, equipment for receive sites at which the 0 dB standard is determinative.

[25] We seek further comment on what, if any, guidelines should be used in determining suitability of spectrum in our companion *Further Notice* at para. 18. Pending the resolution of that issue, we will consider and rule on applications for displacement of point-to-point operations on the E and F channels on an *ad hoc* basis.

[26] Grandfathered ITFS stations on the E and F channels, including point-to-point stations, do have a right to add receive sites where the "natural evolution" of the station reasonably requires such additions without changing the nature or the scope of the ITFS operation. *Memorandum Opinion and Order on Reconsideration* in Gen. Docket No. 80-112, 98 FCC 2d 129, 133 n.8 (1984). Any displacement proposal cannot serve to diminish these rights. An ITFS licensee opposing displacement on the grounds that its ability to expand would be jeopardized by migration must offer a specific proposal for anticipated expansion that will be weighed under the standards developed pursuant to the "natural evolution" provision.

[27] We note that in cases where multiple point-to-point ITFS stations operate on the same channels in the same area, any proposal to displace those stations would need to provide accommodation for all such licensees. Because the bands into which these operations would be moved may be congested, this may reduce the potential for the introduction of additional ITFS point-to-point operations. Nonetheless, this speculative factor does not outweigh the benefit of providing full service by an operation for which the subject spectrum is now dedicated.

[28] *Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 50, 90 n.46, 91 (1985) (*ITFS Second Order*).

[29] The restrictions do not exist, as presumed by some commenters, simply to protect the bargaining position of ITFS licensees, and contentions regarding their ability to protect their own interests are not dispositive of the propriety of lease restrictions.

[30] In allocating spectrum to ITFS, the Commission stated that the purpose of ITFS was to transmit instructional material for the formal education of students and to perform directly related services. *Report and Order* in Docket No. 14744, 39 FCC 846, 853 (1963), *recon. denied*, 39 FCC 873 (1964). In adopting rules to permit the non-ITFS use of excess capacity on ITFS systems, the Commission emphasized that it did "expect ITFS licensees to utilize each of their ITFS main channels substantially for legitimate ITFS use . . . . First, only excess capacity may be leased. We presume the channels were obtained, and are primarily used for, satisfying a legitimate ITFS requirement . . . . Finally, any wholesale abandonment of the primary purpose of the facility could jeopardize the entity's license." *Report and Order* in General Docket No. 80-112, 94 FCC 2d 1203, 1251-53 (1983); *recon. denied*, 98 FCC 2d 129 (1984). In the reconsideration decision, the Commission also stated that, although it declined to establish a limitation on the maximum amount of time that could be devoted to non-ITFS uses of ITFS facilities, it did "emphasize" that ITFS licensees were "'expect[ed] . . . to utilize *each* of their ITFS main channels *substantially* for legitimate ITFS use'". (Emphasis in original). 98 FCC 2d at 136 - 139. It sought to discourage entities not primarily interested in providing ITFS programming from applying for ITFS channels and thus fundamentally changing the nature of the service. Shortly thereafter, when proposing the modification of a number of other rules, the Commission recognized the continually increasing demand for spectrum for educational purposes, and reiterated that "the foundation of the service must continue to be that for which it was designed - the transmission of educational materials to accredited schools for the formal education of students enrolled there . . . . This is especially true where ITFS licensees are leasing excess channel time for MDS-type uses . . . . If we fail to define and enforce permissible use requirements, we risk the loss of the ITFS service to subscription entertainment delivery systems and the failure to meet the important specialized needs the ITFS service is designed to serve." *Further Notice of Proposed Rule Making* in MM Docket No. 83-523, 98 FCC 2d 1249 (1984). In adopting the rules in that proceeding that are at issue here, the Commission reiterated those concerns, adding that it must protect against the loading of ITFS programming into one or two days and the concommitant threat that commercial interests may dominate the licensees' scheduling decisions. *Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 85 (1985).

[31] Some commenters also argue that time-of-day restrictions fail to recognize that educational instruction is no longer an 8:00 to 4:00 (or 9:00 to 5:00) proposition, particularly for the sort of off-campus instruction that is a significant benefit of ITFS delivery capabilities. The rules, however, already account for this characteristic of educational and other informational programming by permitting ITFS licensees to meet the essential use requirement with programming aired from 8:00 a.m. to 10:00 p.m., Monday through Saturday. 47 C.F.R. § 74.931(e). No parties have attempted to demonstrate or argue that these educational pursuits take place on any accountable basis or to any accountable extent outside these hours. We will consider requests to include programs provided outside these hours in individual cases where the party submits a waiver request and can demonstrate the appropriateness of that inclusion consistent with the concerns expressed in this discussion.

[32] To prevent abuse, this provision will be strictly enforced, and no extentions of the two-year period are contemplated.

[33] WHRO-Norfolk argues that the 10-year term is too long. We note that 10 years is the maximum term; parties are free to negotiate shorter terms.

[34] For purposes of this proceeding, the terms "cable" systems, services, or operators are defined at 47 U.S.C. § 522.

[35] We also solicited comment regarding cable control of OFS channels. Our current initiative to reallocate the H channels to MDS, if adopted, would subsume this issue. *See Further Notice* at paras. 5-6. Consequently, no separate action will be taken here with respect to these channels.

[36] *See Report* in MM Docket No. 89-600, (Report to Congress on Cable Television Service), *supra*, note 9. In that *Report*, we stated our conviction that robust competition will serve the public interest in the multichannel video marketplace, and that such competition must be encouraged where possible. We observe that wireless cable is one of the more promising competitors emerging in that marketplace.

[37] We find good cause for making the rule change effective upon its publication in the Federal Register. *See* 5 U.S.C. § 553(d). By doing so, we will prevent the filing of applications by cable entities which would circumvent the limitation adopted here.

[38] *See General Electric Co.*, 61 RR2d 143 (MM Bur. 1986). The Comband technology is briefly explained in that Order. Approval for MDS use was granted in *General Electric Co.*, 60 RR2d 1665 (CC Bur. 1986).

[39] Comband Technologies reports that there are only two operating wireless cable systems presently using Comband equipment -- an eight-frequency, 16-channel system operating in San Juan, Puerto Rico since 1987 and a system in Mexico City operating since 1989.

[40] The 200 watts EIRP represent a combination of 10 watts of transmitter power and a 13 dBi gain antenna and theoretically provides a power flux density of -75.6 dBW/m^2 at 15 miles from a transmitter site, assuming certain transmitter characteristics and receiver antenna height above average terrain.

[41] *See, e.g.*, files for stations KFK37, Buffalo, New York (Microband) and WHT644, Philadelphia, Pennsylvania (Northwest Communications, Inc.).

[42] *See, e.g., Further Notice of Proposed Rule Making and Notice of Inquiry*, General Docket No. 80-113, 98 FCC 2d 7, 13 (1980) (*MDS Further Notice*).

[43] These calculations are based on the methodology and assumptions applied in the *Notice of Inquiry and Proposed Rule Making* in General Docket No. 80-113, 45 Fed. Reg. 29,350 (May 2, 1980) at Appendix 2.

[44] Pending reallocation of the OFS H channels to MDS as proposed in the companion *Further Notice*, we will entertain waivers for H channel applicants to operate pursuant to the higher standard adopted today.

[45] Some commenters have suggested that a better measure of transmitter effectiveness may be derived from measurement of received power level at the edges of and within the protected service area. This could be used to determine spillover into adjacent areas and to determine flux levels in areas within the protected service area where some form of anomaly exists that prevents proper reception. Such a measurement, however, would be time consuming and subject to degradation by adjacent channel power sources, and would require extensive and costly testing prior to installation of the transmitter.

[46] We do not believe that the 30 dBW limit suggested by some commenters would provide sufficient margin to ensure that reliable service will be provided. An EIRP of 30 dbW along an unobstructed path would provide a S/N ratio of 51 dB at the MDS downconverter output and a S/N(F) ratio of 30.3 dB. On the other hand, an EIRP of 33 dBW would support a S/N of 54 dB and a S/N(F) of 33.3 dB. (The term S/N(F) represents the signal to noise ratio expected to be exceeded 99.9% of the time when measured under the worst condition. It has been determined that a S/N(F) of 23 dB is required for a satisfactory video service, *i.e.*, TASO Grade 3.) Recognizing that these levels assume unobstructed path conditions, any propagation anomaly, such as signal attenuation due to foliage (about 10dB) or other propagation conditions, could produce an undesirable quality of service at a power level of only 30 dBW.

[47] *See* 47 C.F.R. § 21.902(a); *Report and Order* in CC Docket No. 86-128, 2 FCC Rcd 5713, 5717, 5723 (1987); *First Report and Order* in Gen. Docket No. 80-113, 98 FCC 2d 68, 93 (1984) (*MDS First Report and Order*).

[48] 47 C.F.R. §§ 21.902(d), 21.902(e), 74.903(a)(2).

[49] We also sought comment on the H channel stations separation standard. We will not take action with respect to the H channel separations standard at this time in light of the further Rule Making pending to reallocate those channels to the MDS service. *See Further Notice* at paras. 5-6.

[50] Several parties on both sides suggest that proposed MDS operations that would interfere with ITFS receive sites outside a specified protected area be permitted where the MDS operator will bear the cost of improving the receive site. New and modifying ITFS operators are already permitted to employ "forced upgrades" for receive sites at any distance from the transmitter in order to institute new systems. 47 C.F.R. § 74.903(a)(4).

[51] Columbia Communications suggests use of the -75.6 dBW/m^2 power flux density upon which the 15-mile radius was based as a contour definition, while proposing investigation of the possibility of using a lower figure to reflect the capabilities of newer equipment. WCA argues for -77.6 dBW/m^2 or the radio horizon, whichever is closer to the transmitter site at each azimuth. WCA would use actual transmitter height and an assumed thirty-foot receive antenna height in making these calculations.

[52] 101 FCC2d 49 (1985).

[53] 4 FCC Rcd 4076, 4078 (1989).

[54] *First Report and Order* in Gen. Docket No. 80-113, *supra*, at 105-106.

[55] This provision extends to equipment only and does not include the introduction of frequency offset transmissions, which are subject to application and approval, as explained in the next section.

[56] Section 94.95 imposes a similar requirement on OFS H channels. We will reserve action on transmitter tolerance standards for the H channels pending the outcome of the pending further Rule Making regarding reallocation of the H channels. *See Further Notice* at paras. 5-6.

[57] *MDS First Report and Order*, *supra*, at 74-75.

[58] ITS proposes a standard of $\pm$ 5 Hz to counter the continuous nature of cochannel interference in the 2.5 GHz band.

[59] *MDS First Report and Order*, *supra*, at 117.

[60] *See* Microband Comments at 3-4, Attachment A.

[61] Both WCA and the Joint ITFS Parties argue that a more reasonable maximum is -15 dB below the peak visual power (based on a maximum transmitter output power of 100 watts, these proposals represent 10 watt and 3.2 watt maximums, respectively). They assert that a -15 dB level provides greater protection against adjacent channel interference. In fact, WCA maintains the signal level may need to be as low as -17 dB below the peak visual power to sufficiently guard against interference.

[62] "Standard reference antenna" refers to the collection of reception characteristics that are used for making interference calculations. Antennas actually deployed are not required to possess characteristics similar to those of the standard reference antenna. The characteristics are specified at 47 C.F.R. § 21.902(f)(3).

[63] While a worst case analysis might lead to a finding of unacceptable interference for a particular hotel or apartment building receive location, a more likely situation is one where the interference source does not radiate directly into the main lobe of the receiving antenna. In such a case, the directional characteristics of the receiving antenna would help discriminate against the unwanted signal and thus provide a signal equal to or better in quality than for residential users.

[64] *MDS First Report and Order* at 86.

[65] We also proposed to authorize signal boosters for OFS H channels. Since this issue will be moot if the H channels are reallocated to MDS, we will reserve action pending the outcome of our Notice of Proposed Rule Making regarding this issue. *See Further Notice* at paras. 5-6.

[66] As obeserved in the *Notice*, a report by John Ramsey of California Amplifier details results of a successful booster demonstration using a parabolic reflector (24 dB gain) driven with less than 10 mW transmitter power for an EIRP of less than 4 dBW. *Notice* at 981 n.40.

[67] Low power auxiliary stations are generally used for wireless microphones, cueing controls, and similar program production applications.

[68] The CARS band is used to relay programming from remote sites to cable system headends and to connect various parts of a cable system. It is also used in lieu of coaxial cable to traverse obstacles such as rivers and superhighways, and where use of coaxial cable would be expensive or impractical, such as urban areas. A wireless cable system would use CARS to provide a communications link between its studio and a distant transmitter.

[69] *Establishment of a Spectrum Utilization Policy*, 48 Fed. Reg. 6730 at para. 33 (1983).

[70] To avoid potential confusion, we note here that this Order does not open the CARS band to SMATV operators. Nor will we include ITFS operators, as HITN suggests. We do not believe that ITFS operators have the same need for the CARS band as MDS licensees. A wireless cable operator will be permitted to use CARS facilities to interconnect with ITFS stations that constitute part of its wireless cable system.

[71] We also note that several operators are converting their microwave links to optical fiber links. As this experimentation progresses, the CARS band could become less congested.

[72] This one-day filing period will also apply to the OFS H channels, as proposed in the *Notice*. *Notice* at 978. Such a procedure was adopted for other OFS channels in the *Report and Order* in PR Docket No. 88-191, 5 FCC Rcd 1220, 1224-25 (1990).

[73] *Report and Order* in Gen. Docket No. 80-112, 94 FCC 2d 1203, 1266 (1983). The shortening of the cut-off period is a procedural rule change, and therefore can be made effective on less than 30 days' notice. *See* 5 U.S.C. § 553(d). In any event, we find good cause for making the rule change effective upon publication in the Federal Register. By doing so, we hope to avoid the filing of numerous speculative applications that would hamper our processing efforts. After this effective date, this rule will apply to all second and subsequent applications if the first conflicting application did not appear on public notice on or before the effective date. However, if the first conflicting application appeared on public notice on or before the effective date, second and subsequent applications may be filed, and mutual exclusivity determinations will be made pursuant to 47 C.F.R. § 21.31.

[74] This rule will become effective January 24, 1991. Therefore, all annual reports filed after that date must comply with the rule, including annual reports filed for the March 1, 1991, deadline.

[75] A few commenters raise arguments regarding other matters. USTA and other exchange carriers argue that they should be permitted into the wireless cable business, and Nevada Bell argues that ITFS should be made available for rural telephone service. NIA and Rocky Mountain object to the recent acceptance for filing of seven applications for ITFS frequencies filed by Nevada Bell. These issues are not within the scope of this proceeding and will therefore not be addressed. In addition, some parties address various internal structures and procedures of the Commission. These comments are also not apt topics in this Rule Making. The Bureaus and Offices that oversee the different services affected by this proceeding will continue to work together to provide wireless cable service to the public as efficiently as possible.

[76] *See Report and Order* in Gen. Docket No. 79-144, 100 FCC2d 543 (1985); *Second Report and Order* in Gen. Docket No. 79-144, 2 FCC Rcd 2064 (1987); *Third Report and Order* in Gen Docket No. 79-144, 3 FCC Rcd 4236 (1988).

[77] OFS stations have been similarly excluded. We will reserve action on this issue regarding the OFS H channels since it will become moot if the H channels are reallocated to MDS, as proposed in the companion *Further Notice*. *See Further Notice* at paras. 5-6. We are not increasing OFS power limits in this *Report and Order*.

[78] *See Report and Order* in Gen. Docket No. 87-551, 3 FCC Rcd 7332 (1988), *erratum* 4 FCC Rcd 1761 (1989).

[79] OST Technical Bulletin No. 65, entitled "Evaluating Compliance with FCC- Specified Guidelines for Human Exposure to Radiofrequency Radiation," published in 1985 by the Commission's Office of Science and Technology (now Office of Engineering and Technology), is available from the National Technical Information Service (NTIS) (1-800-336-4700; order number PB 86-127081). Copies may also be purchased from the Commission's contractor for public records and duplication, International Transcription Services, Inc. ((202) 857-3800).

[80] *See* notes 9, 37 and 73, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-541

In re Applications	
JUAN GALIANO	File No. BPH-871028MA
JOSEPH BAHR	File No. BPH-871028MB
GUILLERMO A. BONET	File No. BPH-871029MH
RENACER BROADCASTERS CORPORATION	File No. BPH-871029MK
OCCIDENTAL BROADCASTING CORPORATION	File No. BPH-871029MM

For Construction Permit for a
New FM Station on Channel 291A
in Hormigueros, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1990; Released: November 1, 1990

By the Commission:

1. Before the Commission are an Application for Review filed May 10, 1990, by Juan Galiano and related pleadings.[1] These pleadings relate to an order of the Review Board affirming the presiding ALJ's dismissal of Galiano's application for failure to demonstrate "good cause" for the late-filing of his Notice of Appearance and requisite hearing fee. *Juan Galiano*, 5 FCC Rcd 2446 (Rev. Bd. 1990).

2. We agree with the Board's determination in this case and will deny Galiano's Application for Review. However, two matters raised by Galiano were not discussed by the Board and warrant comment here.

I. BACKGROUND

3. Juan Galiano filed his notice of appearance and hearing fee on January 19, 1990, ten days after the January 9 due date. Galiano claimed that he had not received the *Hearing Designation Order*, 4 FCC Rcd 8711 (1989) (HDO), released December 20, 1989, until January 17, 1990. Galiano filed an affidavit stating that during mid-September, 1989, Hurricane Hugo had devastated the island of Puerto Rico and that regular mail delivery was only restored in January, 1990. Galiano stated that because of the disruption in mail service, he did not receive the HDO until January 17.

4. Opponents filed documents demonstrating that the Commission mailed the HDO on December 20, 1989 to the mailing address provided by Galiano, that the hurricane did not strike the area around Hormigueros and that the mail service in that area had been restored by October 1, 1989, at the latest.[2] In response, Galiano filed a second affidavit stating that his reference to Hurricane Hugo's devastation of the area surrounding Hormigueros was inaccurate, but unintended. Galiano stated that it "resulted from communication errors between me and my counsel." *Juan Galiano*, 5 FCC Rcd at 2447 ¶ 5. Galiano now claimed simply that he received no correspondence from the FCC, or any of the other parties to this proceeding, concerning the hearing until January 17, 1990, even though he checked his mail daily.

5. The ALJ found the discrepancy between Galiano's statements of critical importance concerning Galiano's claim of good cause for the acceptance of his late-filed notice of appearance. The ALJ dismissed Galiano's application because he had not shown good cause for his failure to file timely his notice of appearance. *Juan Galiano*, FCC 90M-426 (March 5, 1990). The Review Board affirmed the ALJ's action. *Juan Galiano*, 5 FCC Rcd 2446.

II. DISCUSSION

6. Galiano argues that the Board erred in finding that he failed to rebut the presumption that an item mailed is received by the addressee. *See* 5 FCC Rcd at 2448 ¶ 11. Citing *In re Yoder*, 758 F.2d 1114, 1118 (6th Cir. 1985), Galiano maintains that testimony of non-receipt, standing alone, is sufficient to rebut the presumption of receipt. Galiano contends that because there has been "no evidence produced by any other party which contradicts [his] statement of late-receipt," the Commission is constrained to find that Galiano successfully rebutted the presumption of receipt. Application for Review at 8.

7. In *Yoder*, a creditor in a bankruptcy proceeding claimed that the notice of a bar date for filing proofs of claim had not been received by the claimant's attorney, to whom it allegedly had been mailed. The Court accepted the attorney's testimony of non-receipt as sufficient to rebut the presumption of receipt. However, that did not end the court's inquiry. The court then looked to the record for other facts relevant to a determination that the notice was or was not received. In doing this, the court found that the facts proving that a copy of the notice was properly mailed to the claimant were inconclusive and that in those circumstances, it was reasonable to accept the claimant's attorney's affidavit as determinative of non-receipt. Thus, *Yoder* does not stand for the proposition that the submission of Galiano's affidavit is sufficient, standing alone, to establish non-receipt. Rather, the pertinent holding of *Yoder* is that the question of receipt should be resolved on the basis of all of the record evidence, including the regularity of mailing and delivery procedures and the inferences naturally drawn from those facts. *See* 758 F.2d at 1119 n.13.

8. In this regard, we reject Galiano's contention that opponents have produced no evidence to contradict his statements that he did not receive any notice of the designation of this case until January 17. First, as to the HDO, the record shows, and Galiano has never disputed, that the Commission mailed the HDO to Galiano at his post office box address on December 20, 1989. The record

further shows that mail was being delivered on a regular schedule in the Hormigueros area at the time in question. *See* note 2, above. This evidence of regularity of mailing and delivery procedure supports a finding of receipt of the HDO by Galiano sometime before January 17, 1990. Second, as to Galiano's statement that he received no other notice of the designation of this case for hearing before January 17, the record shows, and Galiano does not dispute, that a variety of other hearing-related actions giving notice of the hearing occurred well before January 17. In particular, the Commission mailed a second Order, FCC 89M-2827, assigning the presiding ALJ to hear this case, to Galiano at his post office box address on December 26, 1989, two weeks before the notice of appearance was due to be filed. It is also undisputed that four other applicants mailed their notices of appearance to Galiano at his post office box address on January 4, 8, and 9, 1990. Third, a notice of the HDO appeared in the *Federal Register* on January 4, 1990 and a public notice was published in the local Hormigueros newspaper on January 10 and 11, 1990. [3]

9. Moreover, in light of these facts, the discrepancies in Galiano's affidavits relating to a prolonged disruption of mail service take on a particular significance. Had the HDO been the only document sent to Galiano, we might have a different question before us. However, when combined with the fact that six separate mailings to Galiano from five different sources on five different days were made between December 20, 1989 and January 9, 1990, and Galiano's claim that he received no notice whatsoever of this case being designated until January 17, 1990, the ALJ's questioning of the credibility of Galiano's affidavits is not unreasonable.

10. As the Review Board recognized, if the Commission were to entertain and accept unsupported arguments that letters mailed in Commission proceedings were not delivered, as Galiano urges here, procedural havoc and abuse would result. *See* 5 FCC Rcd at 2447 ¶ 10, citing *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988). Accordingly, based on the record before us, we affirm the action of the Board and the ALJ in dismissing Galiano's application.

11. We are equally unpersuaded by Galiano's attempt to place the blame for his failure to file a timely notice of appearance on the Commission's Rules. Galiano appears to contend that the due process rights to which he was entitled under Section 554(b) of the Administrative Procedure Act were violated because the HDO was not sent certified mail, return receipt requested. Galiano asserts that no problem of notice would have occurred if the Commission had sent the HDO by certified mail, return receipt requested, "rather than unreasonably relying on the United States Post Office to timely deliver this important document." Application for Review at 9.

12. There is no requirement in Section 554 that certified mail be used to provide timely notice, nor has Galiano cited any case precedent establishing such a requirement. The Commission's own rules require only that the order designating an application for hearing be mailed to the applicant by the Secretary of the Commission and the order or a summary thereof be published in the Federal Register.[4] The Commission satisfied each of those requirements in this instance. Thus, Galiano has not been deprived of any due process guarantees by the action taken by the ALJ and the Board.[5]

13. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Application for Review of Juan Galiano filed May 10, 1990, IS DENIED, and that the Replies filed June 1 and 7, 1990 by Juan Galiano ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings were also filed in this proceeding: (1) Opposition to Application for Review filed May 17, 1990 by Joseph Bahr; (2) Opposition to Application for Review filed May 25, 1990 by Renacer Broadcasters Corporation (RBC); (3) Opposition to Application for Review filed May 25, 1990 by Occidental Broadcasting Corporation (Occidental); (4) Errata filed May 29, 1990, by Occidental; and (5) Replies to Oppositions filed June 1, 1990 and June 7, 1990 by Galiano. Under 47 C.F.R. § 1.115(f), replies to oppositions are to be filed only if requested by the Commission. None was requested by the Commission in this case and, therefore, Galiano's replies will be dismissed.

[2] A statement, dated February 1, 1990, of Louis Martinez, the Postmaster of the town of Hormigueros, Puerto Rico indicated that the Hormigueros Post Office was closed only one day, September 18, 1989, because of the hurricane and that regular service had been maintained since that time without disruption. *Juan Galiano*, 5 FCC Rcd at 2446 ¶ 4. This statement is particularly significant because Galiano's mailing address was to a box in that post office. A second letter, dated February 1, 1990, from the Consumer Advocate, U.S. Postal Service, confirmed that mail service was fully functioning in the Mayaguez-Hormigueros area "by the beginning of October at the very latest." *Id.*

[3] Galiano appears to assert that the only evidence that could legitimately call into question the credibility of his affidavits of untimely receipt would be a countervailing affidavit or statement from someone with actual knowledge that Galiano received the HDO or other mailings before January 17. We find this assertion unwarranted in light of *Yoder*. Moreover, Galiano has proffered no support for the proposition that indirect evidence of proper mailing and regularity of mail delivery, as was submitted here, is inappropriate to a determination of the likelihood of timely receipt.

[4] 47 C.F.R § 1.221(b).

[5] To the extent that Galiano is also urging that there should be a change in this procedure for future applications, he should, of course, submit that proposal through the normal rule making process.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-472

In the Matter of

Amendment of Section 73.202(b), RM-7342
Table of Allotments,
FM Broadcast Stations.
(Rock Valley and Sibley, Iowa;
Pipestone, Minnesota; Blair, Nebraska;
and Sioux Falls and Vermillion,
South Dakota)

NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

Adopted: September 27, 1990; Released: October 26, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making jointly filed by Wallace Christensen ("Christensen"), licensee of Station KISD, Pipestone, Minnesota, and Vermillion Radio, Inc. ("Vermillion Radio"), licensee of Station KVRF, Vermillion, South Dakota ("petitioners"). Christensen seeks the substitution of Channel 254C for Channel 254C1 at Pipestone and the modification of its license for Station KISD accordingly. The allotment of Channel 254C to Pipestone requires the substitution of Channel 233A for Channel 252A at Sioux Falls, South Dakota, licensed to Station KCFS. Vermillion Radio seeks the substitution of Channel 292C1 for Channel 292A at Vermillion and the modification of its license for Station KVRF to specify operation on the higher powered channel.[1] The allotment of Channel 292C1 at Vermillion requires the substitution of Channel 248A for Channel 292A at Blair, Nebraska, licensed to Station KBWH, the substitution of Channel 261A for Channel 295A at Rock Valley, Iowa, for which there are applications pending, and the substitution of Channel 282A for Channel 262A at Sibley, Iowa, which is unoccupied and unapplied for. These requests are interrelated because the substitutions of Channel 261A at Rock Valley and Channel 254C at Pipestone require a channel substitution at Sioux Falls.[2] Petitioners state that they will apply for their respective channels, if allotted. Sioux Falls College ("College"), licensee of Station KCFS, Sioux Falls, and Big Sioux Broadcasting, Inc. ("Big Sioux") filed comments.

2. Petitioners state that the upgrading of Stations KVRF and KISD would enable greater coverage of the Pipestone and Vermillion communities as well as the relatively underserved areas surrounding each of the communities. Further, since neither proposal requires more than two existing stations to change channels, they submit that the proposal complies with the dictates announced in *Columbus, Nebraska, et al.*, 59 RR 2d 1184 (1986). Vermillion Radio states that it will reimburse Station KBWH at Blair, Nebraska, and Christensen states that it will reimburse Station KCFS at Sioux Falls, South Dakota, for the costs involved in the respective changes of channel. As to the reimbursement of Station KCFS, Christensen notes that the station's license was recently modified to specify Channel 252A as a result of a petition filed by Big Sioux. *See* note 1, *supra*. Christensen states that it will share the reimbursement costs with Big Sioux if Station KCFS is able to modify its operation from Channel 261A to Channel 233A without first having to change to Channel 252A, as ordered in MM Docket 89-53.

3. College objects to the modification of its license for Station KCFS from Channel 261A to Channel 252A. It believes that the Vermillion and Pipestone upgrades can be accomplished without disturbing Station KCFS' operation on Channel 261A. It states that the station, which operates as a noncommercial educational station, renders a valuable service to the public and that the public interest would be disserved if the station is required to effectuate multiple channel changes. In its comments, Big Sioux submits a copy of its Opposition to Petition for Reconsideration filed in MM Docket 89-53 urging that the decision ordering Station KCFS to vacate Channel 261A be upheld.

4. We believe the public interest would be served by proposing the channel changes requested by Vermillion Radio and Christensen since their proposal could provide Vermillion and Pipestone with wide coverage area FM channels. Although College will be afforded an opportunity to more fully present its views concerning the possible modification of the license of Station KCFS, we note that College is incorrect when it states that the Pipestone and Vermillion changes could be implemented if its station remains on Channel 261A. While the Pipestone upgrade can be accomplished if the modification of Station KCFS from Channel 261A to Channel 252A is reversed on reconsideration, the Vermillion upgrade requires the substitution of Channel 261A for Channel 295A at Rock Valley and this cannot be accomplished unless Channel 261A is deleted from Sioux Falls. We also propose to modify the licenses of Stations KVRF and KISD to specify the higher class co-channels. In accordance with Section 1.420 of the Commission's rules, we will not accept competing expressions of interest in use of Channel 254C at Pipestone or Channel 292C1 at Vermillion, or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. All of the channel allotments under consideration herein can be made in compliance with the Commission's minimum distance separation requirements. Channel 254C can be allotted to Pipestone, Minnesota, with a site restriction of 33.8 kilometers (21 miles) east to accommodate Christensen's desired transmitter site. Channel 233A can be allotted to Sioux Falls, South Dakota, at Station KCFS' present transmitter site. Channel 292C1 can be allotted to Vermillion, South Dakota, with a site restriction of 32.1 kilometers (20 miles) north to accommodate Vermillion Radio's desired transmitter site. Channel 248A can be allotted to Blair, Nebraska, at Station KBWH's present transmitter site. Channel 282A can be allotted to Sibley, Iowa, with a site restriction of 4 kilometers (2.5 miles) west to avoid a short-spacing to Station KUOO, Channel 280C2, Spirit Lake, Iowa. Channel 261A can be allotted to Rock Valley, Iowa, without the imposition of a site restriction and can also be used at

the transmitter sites proposed by the two applicants, Robert M. Mason (BPH-890324MI) and Iowa Communications (BPH-890411MC). [3]

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rock Valley, Iowa	295A	261A
Sibley, Iowa	262A	282A
Pipestone, Minnesota	254C1	254C
Blair, Nebraska	292A	248A
Sioux Falls, South Dakota	223C, 243C, 247C1, 252A, 270C2, 279C2, 284C	223C, 233A, 243C, 247C1, 270C2, 279C2, 284C
Vermillion, South Dakota	292A	292C1

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Sioux Falls College ("College"), licensee of Station KCFS, Sioux Falls, South Dakota, and Sunrise Broadcasting Corporation ("Sunrise"), licensee of Station KBWH, Blair, Nebraska, SHALL SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channels 233A and 248A as proposed herein, instead of their present Channels 252A and 292A, respectively.

8. Pursuant to Section 1.87 of the Commission's Rules, College and Sunrise may, not later than **December 17, 1990,** file a written statement showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on College and/or Sunrise to furnish additional information. If College and/or Sunrise raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, College and/or Sunrise will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensees of Stations KCFS and KBWH, and to the applicants for Channel 295A at Rock Valley, Iowa, as follows:

Station KCFS
Sioux Falls College
1501 S. Prairie Avenue
Sioux Falls, South Dakota 57105

Station KBWH
Sunrise Broadcasting Corporation
131 East 62nd Street
New York, New York 10021

Robert M. Mason
1943 Grenview
Northbrook, Illinois 60062
(BPH-890324MI)

Iowa Communications
1019 - 19th Street, N.W.
Washington, D.C. 20036
(BPH-890411MC)

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **December 17, 1990,** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis F. Begley, Esq.
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D.C. 20036
(Counsel to petitioners)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KVRF presently operates on Channel 272A. However, its license was modified to specify Channel 292A by *Report and Order,* MM Docket 88-195, 4 FCC Rcd 703 (1988).

[2] Station KCFS presently operates on Channel 261A at Sioux Falls. By *Report and Order* in MM Docket 89-53, 5 FCC Rcd 1000 (1990), the Commission, *inter alia,* modified Station KCFS' license to specify Channel 252A. Sioux Falls College, the licensee of Station KCFS, has filed a petition for reconsideration of that action. However, the allotment of Channel 261A to Rock Valley requires the deletion of Channel 261A from Sioux Falls and the allotment of Channel 254C to Pipestone requires the deletion of Channel 252A from Sioux Falls.

[3] The coordinates for Channel 254C at Pipestone are North Latitude 43-53-01 and West Longitude 95-55-44. The coordinates for Channel 233A at Sioux Falls are 43-31-57 and 96-44-20. The coordinates for Channel 292C1 at Vermillion are 43-03-00 and 96-47-12. The coordinates for Channel 248A at Blair, Nebraska, are 41-37-03 and 96-04-23. The coordinates for Channel 282A at Sibley are 43-24-16 and 95-47-43. The coordinates for Channel 261A at Rock Valley are 43-12-12 and 96-17-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-486

In the Matter of

Amendment of Section 73.202(b), RM-7379
Table of Allotments,
FM Broadcast Stations.
(Asbury, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by William Bruce Wachter (petitioner) requesting the allotment of FM Channel 278A to Asbury, Missouri, as that community's first FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration because the proposed allotment could provide a first FM broadcast service to Asbury, Missouri. Channel 278A can be allotted to Asbury, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the above, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Asbury, Missouri	---	278A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 278A at Asbury are 37-16-24 and 94-36-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-487

In the Matter of

Amendment of Section 73.202(b), RM-7390
Table of Allotments,
FM Broadcast Stations.
(Tishomingo, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Ballard Broadcasting Company of Oklahoma, Inc. (petitioner) requesting the substitution of Channel 259C3 for Channel 292A at Tishomingo, Oklahoma, and the modification of its construction permit for Station KTSH-FM to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 259C3 can be allotted to Tishomingo in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KTSH-FM's construction permit.[1] As requested, we also propose to modify Station KTSH-FM's construction permit to specify operation on Channel 259C3 in lieu of its present Channel 292A. However, in accordance with Section 1.420(g) of the Commission's Rules, petitioner's construction permit may not be modified to specify the non-adjacent higher class channel if a competing interest is expressed for use of the channel unless an additional equivalent class channel is available for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 259C3 for Channel 292A at Tishomingo, Oklahoma, since it could enable Station KTSH-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tishomingo, Oklahoma	292A	259C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph E. Dunne III, Esq.
May & Dunne, Chartered
1000 Thomas Jefferson Street, N.W.
Suite 520
Washington, D.C. 20007
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-11-15 and West Longitude 96-43-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-488

In the Matter of

Amendment of Section 73.202(b), RM-7395
Table of Allotments,
FM Broadcast Stations.
(Woodsville, New Hampshire)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Harvest Broadcasting Services (petitioner) requesting the allotment of Channel 249A to Woodsville, New Hampshire, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Canadian concurrence in the allotment is required because Woodsville is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Channel 249A can be allotted Woodsville in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.4 kilometers (0.3 miles) southeast of the community to avoid prohibited interference to Station CHOM-FM, Channel 249C1, Montreal, Quebec, Canada.[1] Although a short-spacing of approximately 61 kilometers between the Woodsville allotment and Station CHOM-FM will remain, we have confirmed that no prohibited interference will occur. Therefore, we will request Canadian concurrence in the allotment of Channel 249A to Woodsville, New Hampshire, as a specially negotiated allotment.

3. We believe the public interest would be served by proposing the allotment of Channel 249A to Woodsville, New Hampshire, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Woodsville, New Hampshire	--	249A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brian Dodge
Harvest Broadcasting Services
RFD 3 Rt. 16N
Dover, New Hampshire 03820
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 249A at Woodsville are North Latitude 44-08-37 and West Longitude 72-02-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-482

In the Matter of

Amendment of Section 73.202(b), RM-6920
Table of Allotments,
FM Broadcast Stations.
(Newport, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Jonathan Seagull Broadcasting Company (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7923 (1989), proposing the allotment of Channel 224C3 to Newport, Oregon, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 224C3 to Newport, Oregon, since it could provide the community with its second local FM service. Channel 224C3 can be allotted to Newport in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Newport, Oregon	224C3, 274C1

4. The window period for filing applications for Channel 224C3 at Newport, Oregon, will open on **December 18, 1990,** and close on **January 17, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 224C3 at Newport are North Latitude 44-38-30 and West Longitude 124-03-00. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-481

In the Matter of

Amendment of Section 73.202(b), RM-6918
Table of Allotments,
FM Broadcast Stations.
(Morehead City, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Curtis Radio Group, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7921 (1989), proposing the substitution of Channel 242C1 for Channel 242C2 at Morehead City, North Carolina, and the modification of its license for Station WRHT(FM) to specify operation on the higher powered channel. Petitioner and Macripine Cable, Inc. ("Macripine"), proposed assignee of Station WRHT(FM), filed comments supporting the proposed upgrade.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 242C1 for Channel 242C2 at Morehead City, North Carolina, since it could enable Station WRHT(FM) to expand its coverage area, thus providing service to additional persons. Channel 242C1 can be allotted to Morehead City in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] As proposed, we will also modify the license of Station WRHT(FM) to specify operation on Channel 242C1 in lieu of its present Channel 242C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Morehead City, North Carolina	242C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Curtis Radio Group, Inc., for Station WRHT(FM), Morehead City, North Carolina, IS MODIFIED to specify operation on Channel 242C1, in lieu of Channel 242C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although untimely filed, Macripine's comments were filed shortly after the Commission announced the acceptance of petitioner's application to assign Station WRHT(FM) to Macripine. Therefore, we have accepted Macripine's comments for the limited purpose of expressing continuing interest in Channel 242C1, in the event that the assignment of license was consummated prior to the issuance of the *Report and Order* in this proceeding.

[2] The coordinates for Channel 242C1 at Morehead City are North Latitude 34-43-18 and West Longitude 76-42-54. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the applicant may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-489

In the Matter of

Amendment of Section 73.202(b), RM-6420
Table of Allotments,
FM Broadcast Stations.
(Altus, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 21, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Altus FM, Inc. and Fred R. Morton (petitioner) requesting the substitution of Channel 300C2 for Channel 300A at Altus, Oklahoma, and the modification of its permit for Station KEYB to specify the higher powered channel.[1] Petitioner states that it will apply for the channel, if allotted.

2. Channel 300C2 can be allotted to Altus in compliance with the Commission's minimum distance separation requirements with a site restriction of 25.5 kilometers (15.9 miles) south to avoid a short-spacing to Station KAKS-FM, Channel 300C, Canyon, Texas.[2] As requested, we also propose to modify petitioner's construction permit for Station KEYB to specify operation on Channel 300C2. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Altus or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 300C2 for Channel 300A at Altus, Oklahoma, since it could provide Altus with an additional expanded service area FM channel. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Altus, Oklahoma	228C2, 300A	228C2, 300C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 24, 1990,** and reply comments on or before **January 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark Van Bergh, Esq.
Gardner, Carton & Douglas
1001 Pennsylvania Avenue, N.W.
Suite 750
Washington, D.C. 20004
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner's request was originally returned as unacceptable for consideration since the grant of its application was the subject of an Application for Review. Petitioner filed a petition for reconsideration of the letter ruling returning its request. However, the Application for Review has been denied and the grant is final. *See Fred R. Morton, Jr.,* 5 FCC Rcd 606 (1990). Therefore, in light of our action herein, the petition for reconsideration is moot and will not be discussed.

[2] The coordinates for this proposed allotment are North Latitude 34-24-30 and West Longitude 99-20-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-33

In the Matter of

Amendment of Section 73.202(b),	RM-7080
Table of Allotments,	
FM Broadcast Stations.	
(Marion, South Carolina)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of John W. Pittman (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 680 (1990), proposing the substitution of Channel 263C3 for Channel 263A at Marion, South Carolina, and the modification of his construction permit for Station WQTI-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 263C3 for Channel 263A at Marion, South Carolina, since it could provide the community with a local wide coverage area FM service. Channel 263C3 can be allotted to Marion in compliance with the Commission's minimum distance separation requirements with a site restriction of 21 kilometers (13.1 miles) northwest to avoid a short-spacing to the requested allotments of Channel 265C2 at Fairmont, North Carolina and Channel 264A at Andrews, South Carolina.[1] *See* 5 FCC Rcd 673 (1990). As proposed, we will also modify petitioner's construction permit for Station WQTI-FM to specify operation on Channel 263C3 in lieu of its present Channel 263A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Marion, South Carolina	232A, 263C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of John W. Pittman for Station WQTI-FM, Marion, South Carolina, IS MODIFIED to specify operation on Channel 263C3, in lieu of Channel 263A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 263C3 at Marion, South Carolina, are North Latitude 34-19-23 and West Longitude 79-32-32. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the permittee may avail himself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

J. David Stoner FOIA Control No. 90-76
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1990; Released: October 19, 1990

By the Commission:

1. The Commission has before it an Application for Review filed by J. David Stoner (Stoner), appealing a May 10, 1990 Freedom of Information Act (FOIA)[1] decision by the Chief, Common Carrier Bureau. Stoner's FOIA request sought access to 37 categories of material generally concerning the procurement practices of NYNEX Corporation's (NYNEX) wholly-owned regulated subsidiaries, New York Telephone Company (NYT) and New England Telephone Company (NET). The Bureau withheld all of the materials requested. NYT and NET filed an Opposition to Stoner's Application for Review on June 14, 1990.

BACKGROUND

2. The Bureau determined that the files relating to the Commission's 1988 audit of affiliate transactions between NYNEX's wholly-owned subsidiary Material Enterprises Company (MECO) and NYT and NET were the logical repository for the material specified in Stoner's FOIA request. This audit resulted in the issuance of an *Order to Show Cause and Notice of Apparent Liability for Forfeitures*[2] and recently culminated in a Consent Decree between NYNEX and the Commission. [3] The audit files contain (1) internal company records obtained by the Commission from NYNEX or its subsidiaries (collectively, "the NYNEX companies") and (2) internal Commission records generated in connection with the audit. The Bureau withheld all materials on the ground that they were exempt either under FOIA Exemption 4 as commercial and financial information the disclosure of which would likely impair the Commission's information gathering abilities,[4] or under FOIA Exemption 5 as documents that reflect the opinions and analyses of Commission auditors and therefore are predecisional and deliberative agency records.[5]

3. Stoner argues that the Bureau erred in limiting its search for and review of documents to files concerning the 1988 audit. He also generally argues that the Bureau erred in not giving a list of documents being withheld and providing a detailed analysis explaining why each document is exempt from disclosure, as well as in failing to analyze each document to determine if certain factual portions are segregable from exempt portions.

4. Concerning the Bureau's withholding of documents under Exemption 4, Stoner argues that disclosure of the requested materials would not impair the Commission's ability to obtain similar material in the future, since the Commission has statutory authority pursuant to section 220 of the Communications Act, 47 U.S.C. § 220, to compel disclosure of certain information from carriers. He also argues that the Commission's standards for withholding documents under Exemption 4 are not clear. Finally, he maintains that many of the documents withheld cannot be protected from disclosure under Exemption 4 or Exemption 5 because they were specifically mentioned or incorporated by reference in the FCC audit report that the Commission ordered disclosed in a companion decision to the *Show Cause Order*.[6]

5. Stoner concludes by arguing that the public interest requires disclosure of the requested documents because they would provide valuable information to people affected by the "misconduct" of NYNEX and its affiliates. If the Commission does ultimately withhold any documents, Stoner says, it should fully justify the withholding of each document and explain why the document could not be produced by redacting sensitive information.

6. In their Opposition to Stoner's Application for Review, NYT and NET argue that the Bureau correctly withheld the requested material under the "impairment" prong of Exemption 4. They also argue that disclosure of the materials would likely cause competitive harm and thus competitive sensitivity is a separate rationale for withholding the material under Exemption 4.[7] Finally, they discredit Stoner's public interest arguments, arguing that his desire to find evidence to support a class action law suit against NYT and NET is not an interest that outweighs the public policy considerations underlying Exemptions 4 and 5.

DISCUSSION

7. *Sufficiency of Search.* Stoner argues that the Bureau erred in limiting its search for responsive materials to the files containing documents obtained or created during the 1988 audit of MECO, charging that additional documents may be located elsewhere within the agency. We conclude, however, that the Bureau's search was adequate.

8. In responding to a FOIA request, "all that is required is that the agency make a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested." *Int'l Trade Overseas v. Agency for Int'l Dev.*, 688 F. Supp. 33, 36 (D.D.C. 1988); *Marrera v. United States Dep't of Justice*, 622 F. Supp. 51, 54 (D.D.C. 1985). In the instant case, the Bureau reasonably concluded that a review of the 1988 MECO files was likely to yield the material Stoner seeks. Though his FOIA request is very broad and inclusive, it essentially asks for all information in the Commission's files relating to the procurement practices of NET and NYT from 1984 "to date."[8] The 1988 audit is the only study the Commission has conducted specifically related to NYNEX affiliate transactions, and its focus was on transactions between NET and NYT and MECO, a subsidiary NYNEX created specifically to provide centralized procurement and support services for other NYNEX companies, including NET and NYT. The audit covered the period January 1, 1984, to January 1, 1989, and the Commission has not undertaken a review of NYNEX affiliate transactions since that time.[9] Thus existing materials concerning both the relevant subject matter and the specified time period were likely to be in the 1988 audit files.

9. Nor is the fact that other isolated documents concerning NET's and NYT's procurement practices may exist elsewhere within the Commission a sufficient ground to conclude that the search was not adequate. *Meeropol v. Meese*, 790 F. 2d 942, 952-53 (D.C. Cir. 1986); *Weisburg v. United States Dep't of Justice*, 745 F. 2d 1476, 1485 (D.C. Cir. 1984). While admitting that such documents might exist, the Bureau explained that its files are not indexed or maintained in a manner that would permit recovery of the information unless agency personnel spent countless hours culling through volumes of material.[10] We agree that such effort would go far beyond the "reasonable" effort to find responsive material required by FOIA, especially in light of the fact that the MECO audit files are themselves so complete and so extensive.[11]

10. *Internal NYNEX Documents*. We also reject Stoner's contention that the Bureau erred in withholding under the "impairment prong" of FOIA Exemption 4 documents in the files that were provided by NYNEX or its subsidiaries during the audit. Stoner argues that the Exemption is not applicable because the Commission has statutory authority to compel production of many of these documents. He also argues that our standards for withholding documents under Exemption 4 are not clear.

11. In *Scott J. Rafferty*,[12] where the FOIA requester sought much of the same material that Stoner seeks, we explained in detail why the application of the impairment prong of Exemption 4 is appropriate for materials provided by carriers during the audit process.[13] The detailed financial and commercial information inspected during an audit is generally sensitive in nature and "would not customarily be released to the public." *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F. 2d 278, 281 (D.C. Cir. 1981), *on remand* 731 F. Supp. 554 (D.D.C. 1990). This fact is highlighted by section 220(f) of the Communications Act, 47 U.S.C. § 220(f), which expressly prohibits the release of information gathered during an audit absent a Commission or court order, and by the Commission's treatment of documents received from a carrier during an audit as records not routinely available for inspection. Further, that the Commission has statutory authority to compel submission of some of the audit data is relevant but not dispositive to a determination of whether the impairment prong of Exemption 4 can be used to protect the material from disclosure to a FOIA requester. *See Public Citizen Health Research Group v. Federal Drug Admin.*, 704 F. 2d 1280 n. 29 (D.C. Cir. 1983); *Washington Post Co. v. United States Dep't of Health and Human Servs.*, 690 F. 2d 252, 268 (D.C. Cir. 1982). If an agency demonstrates that use of alternative means for obtaining information (i.e., compelled production) would entail a significant risk that the value of the information would decrease, the requisite impairment exists. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d at 283.[14]

12. The information gathering process that takes place during an audit begins with a general inquiry that presents an opportunity for a very selective response by the carrier. Nevertheless, in the past, and despite the competitive sensitivity of this information, carriers have been very cooperative, not only permitting the examination of existing company records, but also allowing employee interviews and preparing new documents which otherwise would not have been created. During the 1988 audit, for example, the NYNEX companies submitted, in our estimate, approximately 8500 pages of material. These documents concerned prices, costs, sales, suppliers, contracts, internal practices and procedures, Board minutes and resolutions, and other internal matters. Many were stamped page-by-page with the words "Proprietary/Trade Secret Information" or had actually been initially printed with a notation that they were not for distribution except to NYNEX employees. If such materials are routinely disclosed, it is likely that voluntary assistance in providing information in the future will diminish, especially since the audit process does not present the expectation of a government-bestowed benefit. Furthermore, if the Commission were forced to issue or litigate compulsory orders or to impose sanctions to obtain the materials, both the quality and amount of information now provided on a voluntary basis would likely diminish. Under such circumstances, audit material is properly withheld under the impairment prong. *See Scott J. Rafferty* at 3-4; *Martha H. Platt* at 1-2; *Western Union Telegraph Co.*, 2 FCC Rcd 4485 (1987).[15]

13. Stoner nonetheless argues that the Commission's statement in the *Audit Disclosure Order* that release of the report concluding the 1988 audit would not threaten the agency's information gathering abilities undermines the application of the impairment prong to the NYNEX materials at issue in this case. In the *Audit Disclosure Order*, however, we expressly left open the question whether information underlying the audit report remained exempt from disclosure.[16] Subsequently, in *Rafferty*, we made clear that the information is indeed protected from disclosure under the impairment prong. *Rafferty* at para. 5 and n. 7. We noted in *Rafferty* that the particular audit report released pursuant to the *Audit Disclosure Order* contained only summaries of material submitted by the NYNEX companies, not the more sensitive underlying data. The risk of diminished cooperation by the carriers from the release of summarized data in that particular audit report was significantly less than the risk posed by release of the underlying information.[17]

14. In addition to our conclusion that the Bureau correctly applied the "impairment prong" to withhold the materials supplied by the NYNEX companies, we note that the court in *National Parks I*, 498 F. 2d at 770 n. 17, suggested that other governmental interests, such as "problems of compliance and program effectiveness," may be protected by Exemption 4. Courts have subsequently recognized that Exemption 4 protects governmental interests other than the ability to obtain information in the future. *See Critical Mass Energy*, 830 F. 2d at 286 (Exemption 4 protects against impairment of "efficiency and effectiveness" of agency); *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 6-11 (1st Cir. 1983) (Exemption 4 protects "legitimate governmental interest of efficient operation"); *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of United States*, 464 F. Supp. 804, 808 (D.D.C. 1979) (Exemption 4 protects against impairment of "effectiveness" of agency). We believe that the materials produced by the NYNEX companies that Stoner seeks are protected from disclosure by this "third prong" of Exemption 4. As disclosure of the materials is likely to significantly diminish the cooperation of carriers, the Commission will have to rely on compulsory measures to obtain necessary information. *See* paras. 11-12, *supra*. Resort to litigation would involve considerable expense and delay and significantly impede the efficiency and effectiveness of the Commission's audit process.[18]

15. *Internal Commission Records.* In addition to documents submitted by the NYNEX companies, the 1988 MECO audit files contain numerous documents created by Commission staff or obtained from outside sources other than the NYNEX companies. The Bureau withheld these documents in their entirety on the ground that they are predecisional and deliberative agency records exempt from disclosure under Exemption 5[19] and on the ground that, to the extent they reflect the commercial and financial data submitted by NYNEX, they are exempt from disclosure under Exemption 4.

16. We agree that, to the extent the Commission documents directly reflect underlying factual information submitted by the NYNEX companies, they are protected by the impairment prong of Exemption 4. *See* paras. 10-13, *supra*.[20] We also concur that the documents created by Commission staff are protected under FOIA Exemption 5.[21] These documents reflect staff assessments of a range of issues and information related to the MECO audit during the period prior to issuance of the *Show Cause Order*. The documents analyze NYNEX affiliate transactions in order to advise superiors concerning NYNEX compliance with Commission rules and policies. They are thus clearly agency records that are both predecisional and deliberative in nature and therefore within the scope of Exemption 5.

17. Additionally, we believe that the documents are protected from disclosure under FOIA Exemptions 7(A) and 7(E) as records and information compiled for law enforcement purposes, the disclosure of which (i) could reasonably be expected to interfere with the ongoing enforcement proceeding against NYNEX and (ii) would reveal the techniques and procedures for law enforcement investigations.[22] The agency records at issue in this case are clearly records compiled for law enforcement purposes because they were assembled as part of the Commission's efforts to enforce section 201(b) of the Communications Act, 47 U.S.C. § 201(b).[23] *See, e.g., Birch v. Postal Serv.*, 803 F. 2d 1206, 1210-1211 (D.C. Cir. 1986) (Exemption 7 threshold met because enforcement of relevant law is within the statutory authority of the agency). The Consent Decree that the Commission recently signed with NYNEX is "expressly contingent upon . . . [NYNEX] compliance with the terms of [the] Consent Decree",[24] and NYNEX has thirty days to comply with some provisions of the Decree.[25] If the Decree is rendered invalid through NYNEX's failure to comply with its provisions, the decree becomes null and void and the Commission could institute new proceedings against NYNEX.[26] Release of internal Commission documents that analyze the case against the NYNEX companies prior to expiration of the compliance period would undoubtedly prejudice the Commission in such proceedings. Thus the documents are within the scope of Exemption 7(A). *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) (Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of . . . information"). Moreover, release of the files that map step-by-step the Commission's investigatory process could provide a blueprint for other carriers to frustrate or defeat the audit process through which the Commission attempts to uncover violations of section 201(b). Thus the documents are within the scope of Exemption 7(E). *See Minnesota v. Dep't of Energy*, Civ. No. 4-81-434, slip op. at 10 (D. Minn. Dec. 14 1982) (details of techniques used in oil refinery audit within scope of Exemption 7(E)).

18. Some staff-created documents in the Commission files, as well as certain materials obtained from outside sources other than NYNEX, are, however, purely factual in nature, and are not within the scope of Exemptions 4, 5, or 7. We are ordering their release pursuant to the requirements of the FOIA. These documents include, for example, the index to each volume of Commission documents, certain factual chronologies, documents or portions of documents indicating the times and places of meetings and attendees, and numerous newspaper articles or transcripts of newscast concerning the alleged NYNEX misconduct.[27]

19. *Discretionary Disclosure.* Stoner states that the Commission's *Show Cause Order* alleges misconduct affecting millions of consumers in seven states. He further notes that the FCC has no jurisdiction over the intrastate aspects of the alleged misconduct. He believes the public must have all the information relevant to this alleged misconduct "so the millions of people affected may use all the tools at their disposal to correct this situation." More particularly, he contends that the "specific and concrete public benefit to be gained by the release is to publish what the NYNEX companies tried to hide from the regulators . . "

20. In ordering public release of the NYNEX audit report, we expressly recognized that the public has a legitimate interest in the conduct and outcome of the Commission's enforcement proceedings against NYT and NET. The audit report contains the factual underpinnings of our decision to initiate enforcement proceedings and fully informs the public as to critical facts underlying the alleged misconduct. Therefore, while we share Stoner's objective to keep the public informed, we think that goal has been satisfied by disclosure of the audit report.

21. As to the intrastate aspects of the alleged misconduct, we further note that the New York Public Service Commission has complete access to all the data obtained during the Commission's audit and has made this data available to parties in its proceedings, subject to a protective order. *See Rafferty*, *supra*, at para. 8. Accordingly, there is no danger that state regulators or participants in state proceedings will be denied information necessary to carry out state regulatory responsibilities.

22. Stoner does not identify what additional "corrective tools" might be used by "consumers in the seven states" affected by the alleged misconduct or how they might be aided in their efforts by public disclosure of the requested information. We note initially that Stoner himself is presumably a resident of Pennsylvania, where he practices law, not one of the seven states served by the NYNEX companies. We assume therefore that he may refer to his efforts to initiate a private, class action suit against the NYNEX companies. *See* Stoner Freedom of Information Act Request at pages 2-3. (Stoner's law firm, Greenfield and Chimicles, has filed a class action charging the NYNEX companies with violations of the Racketeer Influenced and Corrupt Organizations Act, common laws of fraud and negligent misrepresentation, and various state consumer laws.) Congress, however, did not intend that the FOIA serve as a tool for discovery, and a party's need for information in connection with litigation gives it no greater right than that shared by an average member of the public. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 132

U.S. 132, 143 n. 10 (1975); *EPA v. Mink*, 410 U.S. 73, 79, 92 (1973). Therefore, in balancing whether the public interest in disclosure of the documents outweighs the justification for withholding them under the relevant FOIA exemptions, we are not persuaded that the interests of civil litigants, or their attorneys, in obtaining the documents requires their release.

CONCLUSION

23. In view of the foregoing, the Application for Review filed by J. David Stoner is denied to the extent indicated herein.[28]

24. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 5 U.S.C. § 552.

[2] *New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates*, 5 FCC Rcd 866 (1990) (*Show Cause Order*).

[3] *New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates*, FCC 90-328, released October 4, 1990 (*Consent Decree*).

[4] FOIA Exemption 4, 5 U.S.C. § 552(b)(4), permits the withholding of "commercial or financial information obtained from a person and privileged or confidential." Generally, information is confidential "if disclosure . . . . is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974) (*National Parks I*).

[5] Exemption 5 of FOIA prevents the disclosure of "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been extended to incorporate certain common law privileges developed in civil discovery cases, including, *inter alia*, the deliberative process privilege. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F. 2d 854 (D.C. Cir. 1980); *Jordan v. Dept. of Justice*, 591 F. 2d 753, 772-73 (D.C. Cir. 1978) (en banc). Generally, this privilege protects predecisional documents that are part of the deliberative process of examining agency policy. *Coastal States Gas Corp.*, 617 F. 2d at 868; *Vaughn v. Rosen*, 523 F. 2d 1136, 1143-44 (D.C. Cir. 1975).

[6] The companion decision is *New York Telephone Co. and Material Enterprises Request for Confidential Treatment of Certain Financial Information*, 5 FCC Rcd 874 (1990) (*Audit Disclosure Order*).

[7] *See* n.3, *supra*.

[8] Since the Commission is only required to recover responsive records in its possession and control as of the date of its receipt of the request, 47 C.F.R. § 0.461 (e)(6), the relevant time period for documents ends on April 2, 1990, when the Commission received Stoner's filing.

[9] The only Commission review of NET and NYT's activities completed since the 1988 audit is the Commission's report reviewing the carriers' attestation audit for the 1988 calendar year. (The Commission has not yet begun the process of reviewing the attestation audit for the 1989 calendar year.) That report concerns the carriers' general compliance with our cost allocation policies rather than specific information concerning their procurement procedures. The factual portions of that report have been publicly disclosed in a separate FOIA action and therefore will be provided to Stoner. *See Allnet Communications Services, Inc.*, FCC 90-277, released July 27, 1990. We will also provide Stoner with several NYNEX documents that the carrier made public in the *Allnet* proceeding.

[10] We note that, in any event, Stoner's authorized search fee of $250.00 was grossly inadequate to support a search for isolated documents that might be located in files throughout the Commission. If at this point he wishes the Commission to initiate such a search, he must authorize the expenditure of additional money or demonstrate that he qualifies for a fee waiver. (Mr. Stoner requested a fee waiver in his initial FOIA request, but failed to submit certain information in support of the waiver request as required by 47 C.F.R. § 0.470. The General Counsel has notified Mr. Stoner of the need to supplement his request.)

[11] The documents submitted by the NYNEX companies are contained in five large boxes and comprise approximately 8500 pages of material. The internal Commission documents fill nine additional binders, each at least two inches thick.

[12] FCC 90-249, released July 11, 1990.

[13] *See also Martha H. Platt*, FCC 90-323, released October 3, 1990.

[14] Stoner's reliance on *Arvig Telephone Company*, 3 FCC Rcd 3723 (CC Bur. 1988), for any contrary proposition is misplaced. In the *Arvig* case, the Common Carrier Bureau clearly stated that the agency's ability to compel production of material does not automatically eliminate protection under the impairment prong. *Arvig* at 3724. However, in that particular case, the Bureau refused to grant requests for confidentiality to material routinely submitted by local exchange carriers (through their trade association) because the carriers had not submitted evidence to support their claims of confidentiality and because, unlike our position in this case, the Bureau could not foresee how disclosure of the information would impair the agency's ability to obtain the relevant material in the future; Commission rules required submission of the data at issue and the Bureau did not believe those rules would be challenged. Furthermore, to the extent that *Save the Dolphins v. Dep't of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975), discussed at length by Stoner, can be read to disallow protection of material under the impairment prong if the government can compel its production, it must be noted that, subsequent to *Save the Dolphins*, the United States Court of Appeals for the D.C. Circuit, as discussed above, has clearly held that ability to compel is but one relevant factor in determining the applicability of the exemption.

[15] Stoner faults the Bureau for not attempting to segregate non-sensitive material in the documents from sensitive, exempt material. However, in circumstances where, as here, the amount of material is large and the percentage of non-exempt material is relatively small and so interspersed that extracting it would

be extremely burdensome, the agency is not required to engage in a line-by-line analysis. *See Lead Indus. Ass'n v. OSHA,* 610 F.2d 70, 76 (2d Cir. 1979). Even if we were required to conduct such an analysis, we note that the $250.00 search fee authorized by Stoner would be grossly inadequate to pay for the costs.

[16] *Audit Disclosure Order,* 5 FCC Rcd at 874.

[17] Thus we also reject Stoner's contention that, at a minimum, all documents that served as the basis for the summaries in the audit report or were listed in the audit report should be released. Stoner's reliance on *Arvig Telephone Company* to support such propositions appears to be misplaced; we do not see any indication in the case that the listing of an item in a public document automatically excludes the item itself from subsequent protection under FOIA Exemption 4.

[18] We need not address here the question whether the materials at issue might also be protected by the competitive harm prong of Exemption 4, *see* n. 3, *supra,* as NET and NYT assert in their opposition to Stoner's Application for Review.

[19] *See* n. 4, *supra.*

[20] We note in this regard that many of the Commission documents append one or more entire confidential NYNEX documents.

[21] Stoner argues that certain Commission documents were incorporated by reference in the *Show Cause Order* or audit report and that those documents must be released pursuant to the holding in *NLRB v. Sears Roebuck & Co.,* 421 U.S. 132, 161 (1975). That case, however, states only that "if an agency chooses *expressly* to adopt or incorporate by reference an inter-agency memorandum previously covered by Exemption 5" in an otherwise final opinion, then the memorandum is no longer protected by Exemption 5 because it in essence becomes part of the final agency determination. (Emphasis in original.) In the instant case, the *Show Cause Order* relies on Commission findings in the audit report, which is publicly available, but it does not adopt or incorporate by reference any other staff memorandum. Nor does the audit report itself expressly adopt or incorporate by reference any other internal memorandum. Thus the holding of the *Sears* case is inapplicable.

[22] 5 U.S.C. §§ 552(b)(7)(A) and (b)(7)(E).

[23] This section makes unlawful any common carrier charge, practice, classification, or regulation that is unjust or unreasonable.

[24] *Consent Decree,* para. 12.

[25] *Consent Decree,* para. 6.

[26] *Consent Decree,* para. 12.

[27] We have not made a line-by-line analysis of documents that are primarily exempt to determine if there is factual material that can be released. As discussed in n.14, *supra,* such analysis is not required where the number of documents is so great and the proportion of non-exempt material is relatively small and interspersed with the exempt material.

[28] The Commission is not required at the administrative level to provide the *Vaughn* index requested by Stoner. *See Vaughn v. Rosen,* 484 F. 2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); *Safecard Services, Inc. v. Securities & Exchange Comm'n,* Civ. No. 84-3073, slip op. at 1 (D.D.C. 1986) ("No court has held that a requesting party may compel production of a *Vaughn* index before completing its administrative appeal.") However, we are providing Stoner with copies of the index to each of the nine volumes of Commission materials, which will give him much of the information that a *Vaughn* index would give. As to NYNEX provided material, we note that the *Show Cause Order* and *Audit Disclosure Order* identified many of the most relevant documents, and those documents were actually listed in Stoner's FOIA request.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-162

In the Matter of

Evaluation of the Syndication
and Financial Interest Rules

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1990; Released: October 22, 1990

1. On March 14, 1990, we terminated BC Docket No. 82-345[1] and instituted a new Rule Making proceeding to evaluate the financial interest and syndication rules set forth in 47 C.F.R. § 73.658(j).[2] After reviewing the comments and reply comments submitted on our notice of proposed Rule Making, we are adopting this further notice to solicit comment on several specific proposals developed during the course of this proceeding as a means of focusing the Commission's deliberations on the appropriate regulatory response to the issues we have raised. In general, the proposals on which we seek additional comment suggest modification of the financial interest rule, subject to certain safeguards, and a narrowing of the prohibitions against network participation in foreign and domestic syndication. In order to better assess the merits of these proposals, we will also hold one day of *en banc* hearings on December 14, 1990 in Washington, D.C. to receive oral testimony from interested parties. We emphasize that, by asking specific questions about these proposals, the Commission is not foreclosing the possibility of either retaining or repealing the financial interest and syndication rules in their entirety, or adopting rule modifications different from those discussed in this notice.

I. BACKGROUND

2. The financial interest and syndication rules, adopted in 1970, prohibit television broadcast networks from acquiring any financial interests in the subsequent broadcast of independently produced programs other than the right to exhibit the programs on the network. The rules further forbid the networks from actively syndicating, or having any interest in the syndication of, programs for non-network broadcast distribution. A limited exception entitles the networks to syndicate outside the United States programs that they themselves have produced. The Commission adopted the rules in order to promote "a freer, more diversified television production and distribution process." *Amendment of Part 73 of the Commission's Rules*, 23 FCC 2d 382, 387 (1970) (subsequent history omitted). At that time, we emphasized the importance of "[d]iversity of programs and development of diverse and antagonistic sources of program service" to the broadcast industry. 23 FCC 2d at 400. In recent years, however, an important issue has arisen: whether changes in the industry over the last twenty years justify modification of our financial interest and syndication rules and whether the rules are still needed to promote broadcast program diversity.

3. In our first notice in this proceeding, we sought comment on five basic proposals to modify the financial interest and syndication rules: (1) retain the existing rules intact; (2) eliminate the financial interest rule but retain the syndication rule intact; (3) eliminate the financial interest rule and modify the syndication rule as proposed in the Tentative Decision in BC Docket No. 82-345; [3] (4) eliminate the financial interest rule and modify the syndication rule to permit the networks to syndicate a certain number or percentage of programs or to participate in a share of the profits of programs syndicated by others; and (5) retain the existing rules but add an exception for emerging networks by revising the definition of a "network" set forth in 47 C.F.R. § 73.658(j)(4). In addition, we asked commenting parties to suggest alternative proposals for modifying the financial interest and syndication rules.[4]

4. The notice also strongly encouraged interested industry participants to negotiate a proposed solution to the complex issues raised by the financial interest and syndication rules. In order to give the parties sufficient time to reach a mutually acceptable compromise, we deferred the beginning of the comment cycle until June 14, 1990. On the eve of the comment deadline, however, we were informed that the parties had been unable to negotiate a successful settlement and would not be presenting an industry compromise to the Commission for our review.

5. The Commission in this proceeding has received 22 comments and 30 reply comments from interested parties.[5] These submissions include several economic studies regarding financial interest and syndication policies. After carefully reviewing the comments and reply comments, we have determined that additional information should be solicited on several proposals developed during the course of this proceeding. As stated above, this further notice does not reflect a decision to adopt any of the proposals; rather, we have concluded simply that it would be useful to receive further information on the safeguards and restrictions that have been proposed by several commenters who urge us to retain our rules in some form. We also invite analysis of other possible safeguards or restrictions formulated by our staff, including variations on the proposals already advanced by some commenters.[6] Accordingly, in the paragraphs below, we seek further comment on the type of safeguards that might be required if the networks were permitted to acquire financial interests. We also seek comment on whether competitive safeguards (such as protections against warehousing and affiliate favoritism) are needed in the event we decide to allow television networks to engage in foreign and domestic syndication activities of any kind. Further, we seek information on whether we should allow any revised rules to sunset after some period of time, or whether we should simply revisit the need for such rules at a later date. Finally, we seek comment on whether the definition of a network should be revised and whether emerging networks such as the Fox Broadcasting Corporation (FBC) should be subjected to whatever financial interest and syndication rules we may retain.

II. FINANCIAL INTERESTS

6. The comments and reply comments we have received in this proceeding reflect a consensus among program producers that the Commission should retain the financial interest rule. By contrast, a number of other commenters, including the three television networks, the network affiliates, the Department of Justice and the Bureau of Economics of the Federal Trade Commission, propose that we eliminate the restriction on network acquisition of financial interests in its entirety. Still other commenters suggest that we relax the financial interest prohibition, but only to a limited extent or only subject to certain safeguards.

7. We believe it would be fruitful to further explore various proposals recommending that we permit the networks to purchase financial interests, provided they abide by regulatory restrictions designed to guard against anticompetitive conduct and to ensure program diversity. We note that the National Telecommunications and Information Administration of the Department of Commerce (DOC/NTIA), the Writers Guild of America (WGA) and FBC have made specific suggestions as to how the financial interest rule could be modified to address the divergent interests of the parties in this proceeding.[7] In its reply comments, for example, DOC/NTIA proposes that the networks be permitted to acquire financial interests in non-in-house produced programs, provided that (a) negotiations for such interests are held separately from the negotiations over network exhibition rights and only after the program has been scheduled for its initial network run, and (b) the networks are prohibited from subsequently discriminating against programs in which they hold no financial interests. In a similar vein, WGA proposes that the networks be permitted to acquire limited, passive financial interests in programs produced by "truly independent" producers only when requested by the independent producer at a point after network commitment to the program. Also, FBC suggests that the networks be prohibited from producing for themselves more than 50 percent of their programming and/or more than 50 percent of their prime time programming.[8] The networks would be permitted to hold financial interests and/or syndication rights, but only in those shows that they themselves produced.

8. As these proposals suggest, there are at least two fundamental approaches that we could take to permit network acquisition of financial interests with safeguards. The first of these would entail regulating in some fashion the negotiations that take place when a network is interested in purchasing a program from an outside producer for exhibition on its network. The second alternative is to somehow limit the number or types of programs in which a network could acquire financial interests. In commenting on the various safeguard proposals discussed herein, parties should specify which of the following (or other) potential concerns the proposed option would (or would not) be effective in safeguarding: network extraction of, or underpayment for, a financial interest; network favoritism of programs in which it holds a financial interest (or discrimination against programs in which it holds no such interest); and loss of diversity through curtailment of a producer's financial or creative independence.

9. *Producer-Initiated Negotiations.* In their comments and reply comments, program producers claim that the networks have sufficient leverage over producers to require them to surrender financial interests (and/or syndication rights) in exchange for exhibition on the network.[9] In the event the record should show that networks do have an unfair advantage in negotiations that ultimately results in reduced program diversity, we seek comment on whether certain limits could be placed on the networks to make those negotiations more balanced. In particular, we seek comment on whether program producers should be permitted, on an unrestricted basis, to sell financial interests to the networks as long as the *producer* initiates the offer to sell, with no coercion by the networks. Such an approach might make it possible for a producer who wants financial assistance from the networks to seek it, but might also offer some protection to producers who are not interested in network financing. We also seek comment on the specific proposal made by WGA, mentioned above, that would similarly require that the producer initiate any discussions over network acquisition of financial interests.[10]

10. *Separate Negotiations.* An alternative approach to addressing the question of leverage in program negotiations is to dictate when negotiations for a financial interest could occur. DOC/NTIA proposes that the networks be required to conduct negotiations for a financial interest after the initial program scheduling.[11] The networks have responded to this proposal by arguing that it would effectively preclude them from obtaining a financial interest because producers generally obtain outside financing at the same time or shortly after a network orders the production of a pilot (and commits to license fees). The networks contend that these events occur well in advance of scheduling and series orders.[12] The DOC/NTIA proposal may also prove difficult to enforce because the same persons are likely to be involved in both sets of discussions. To the extent that commenters find fault with the specifics of DOC/NTIA's separate negotiations proposal, we seek information on how such a scheme could be modified to provide both an adequate safeguard and a meaningful mechanism for network participation in program production financing.[13] To that end, we seek responses to the following questions relating to the particulars of program production financing:

> (a) At what stage does a television series producer typically seek financing for production of a pilot? For production of a series? What rights, *e.g.*, a passive financial interest, foreign syndication rights, and/or domestic syndication rights, does a producer typically give up in return for financing of a pilot and/or series? In this context, commenters should address whether the following example constitutes the industry norm for financing of a new series:
>
> > Producer X presents a series idea to a network in November. The network orders a pilot in January or February, at which time the parties agree on license fees for the pilot and potential series. If Producer X needs additional funds (other than the license fee) to produce the pilot, Producer X generally sells syndication rights (foreign first, then domestic) for the pilot (and/or the potential series) to obtain those funds. In April or May, the network announces its schedule and commits to a series order with Producer X. At that time, Producer X (if concerned about the se-

ries' anticipated deficits) offers to sell equity interests (financial interests) in the series to a variety of sources.

(b) How does this process change in the financing of television movies ("MOWs") and mini-series?

(c) Given existing practices for arranging financing, if a separate negotiations requirement were adopted, would the financing process for outside productions be likely to evolve in a way that accommodated a network's ability to purchase a financial interest only after scheduling of a new series? What effect, if any, would changing the timing of the negotiations over financial interests have on the total amount invested in a program or the nature of the program itself?

(d) Under existing rules, how do networks and program producers arrange financing for pilots and series produced pursuant to joint venture, multi-project and umbrella deals? Are these arrangements replacing the standard license fee as the source of financing for non-in-house series (and/or MOW) productions? Do these alternative deals tend to involve only established producers, or relative newcomers as well? Does the nature of these alternative deals suggest they could safely go forward without any separate negotiation requirement? If so, should there be a limit (*e.g.*, one-half of the prime time schedule, as proposed by FBC, or less) on how much of the networks' schedule could be comprised of programming produced under these "unrestricted" deals? (*See* subparagraph 12(b) below for additional discussions of a percentage of schedule cap.)

(e) How should a separate negotiations requirement be applied to a multi-project deal in which a producer proposes to produce several pilots for the network pursuant to a single agreement? Should there be separate negotiations for each program at issue, or could all programs involved be covered by a single separate negotiations requirement?

(f) Focusing on the typical license fee and subsequent series order contemplated by the separate negotiations proposal, would a "cooling off" period between the closing of the license fee agreement ("A deal") and the financial interest negotiation ("B deal") be critical to the effectiveness of this safeguard? In this context, is there a significant difference between negotiations for equity (financial) interests and syndication (foreign or domestic) rights? Would the absence of a "cooling off" period tend to make the separate negotiations a sham? If so, how? If not, should the networks be allowed to make separate but simultaneous offers for financial interests at the time they negotiate exhibition rights?[14]

(g) Should there be any end-date, *e.g.*, end of production for the series' first season, for closure of a "B" deal? If not, should there be additional safeguards against a network insisting on a financial interest (or any other ownership rights in the series at issue or in any other program of that same producer or studio) as a condition of the network's continued commitment to that series?

11. *Percentage of Schedule or Other Cap.* As mentioned above, another means of permitting network acquisition of financial interests with safeguards would be to limit the number and/or types of programs in which the networks could hold ownership interests. Such safeguards could take various forms. The Commission could cap the percentage of scheduled programs in which a network could actively participate in production; we could cap the percentage of scheduled programs in which a network could acquire financial interests of any kind, whether through active participation or passive investment; or we could cap the percentage of a financial interest a network would be permitted to acquire in individual programs. We generally request comment on the utility of a "cap" approach to permitting network financial interests in programming.

12. As previously mentioned, one possible approach is to set a cap on the percentage of prime time programs in which the network could be actively engaged in production, *e.g.*, in-house or co-productions and joint ventures. Commenters are asked to address the following questions with respect to this proposal:

(a) As an initial matter, would a "percentage of schedule" cap be an effective safeguard against a network's alleged ability to extract an excessive financial interest in the programs it airs and/or alleged ability to limit diversity of programming through financial interests in a portion of its schedule?

(b) If so, would it be appropriate to limit the network to active participation in no more than one-third of its prime time schedule?[15] Would even a one-third cap permit "cream-skimming," whereby a network could still end up a "joint venturer" in virtually the entire class of its programs with potentially significant syndication value (*e.g.*, half-hour situation comedies)?

(c) Is it feasible and appropriate to distinguish "joint ventures" (or other productions in which a network is an active, but not the sole, participant) from outside productions in which the network is merely a passive profit participant? If not, does this suggest that any percentage of schedule cap should be applied only to programs produced "in-house"? How should the term "in-house" be defined? Should it be sufficiently broad to include certain joint venture or co-production arrangements but not others?

(d) Should the cap be limited to prime time entertainment programming, excluding news and sports programming? Should the same percentage serve as a sub-cap for non-series entertainment programming, *i.e.*, MOWs, mini-series and "one- shot" specials (*e.g.*, a one-hour music special)?

(e) Would some sort of oversight mechanism, *e.g.*, maintenance or filing of an annual network report of programs in which it is an active participant (such as that required for in-house productions under the networks' consent decrees), be warranted for enforcement of such a rule?

13. Another approach would be to allow the networks to acquire financial interests in a certain percentage of the programs in their schedules, whether produced in-house or by outside entities. Questions (a), (b), (d) and (e) of

Paragraph 12, above, are relevant to this proposal, and commenters should address them in this context. In addition, we request comment on the following questions:

(a) To what extent, if at all, would flexibility in the form of permissible network participation allow program producers to retain independence from network control?

(b) How should the Commission define a "financial interest" (either active or passive)? To what extent, if at all, would a cap on both active and passive ownership ease administration of the rules?

14. Yet another cap approach may be to limit the amount of a financial interest in individual programs that a network could acquire. INTV, for example, proposes that the networks be limited to holding substantially less than a 50 percent interest in independently produced programs. If an "individual program limit" were adopted, what definitions and accounting principles would need to be developed to implement the rule? Commenters are asked to address the relative merits of each of the foregoing options, and to suggest any variations they believe would be more practical and/or more effective.[16]

15. *Potential Discrimination.* We also seek comment on the DOC/NTIA proposal that the networks be expressly prohibited from "discriminating" in favor of programs in which they hold financial interests. Does the record over the past few years regarding network treatment of in-house productions suggest a need for such a safeguard (*e.g.*, have those series received more favorable scheduling than outside productions)? Comment is also solicited on how "discrimination" should be defined, and how any anti-discrimination requirement should (or could) be enforced. Would possible claims of discrimination arise in every instance of less than the most favorable treatment as to an outside production's license fee, pick-up, scheduling, promotion, cost pass-throughs, renewal terms, or cancellation? Is it feasible for the federal government to be so involved in overseeing network conduct that inherently involves basic business and subjective judgments?

16. *Market Power of Production Companies.* Market power assertions and evidence in this proceeding are not limited to the networks. Some parties contend that the market power held by the major studios (or by highly successful independent producers) is no less or may be even greater than that of the networks. We accordingly solicit comment on whether we should consider the extent of market power held by certain program producers when addressing our financial interest and syndication rules.

17. For example, the comments and reply comments suggest that there are situations in which a network, in order to acquire the network exhibition rights for a program produced by a particular writer or producer, must also acquire rights in other programs developed by that writer or producer -- sometimes without even seeing a script for the additional program(s) or knowing the general program concept. We seek comment on whether we should adopt any limits on such producers that would prevent them from extracting commitments from the networks that go beyond the program under consideration. In addition, to the extent the record should indicate that the major studios or certain independent producers have considerable leverage in their negotiations with networks, we solicit comment on whether the networks should be precluded from insisting on financial interests as a condition precedent of network exhibition only in those programs produced by small independent producers who have no significant negotiating leverage.

18. Finally, we note that the Commission's authority to deal with issues of studio or producer market power may be limited. We thus solicit comment on whether we should request that the Department of Justice assume oversight of network/producer relationships and transactions, given that it currently administers the network and studio consent decrees and has the authority to deal with any market power held by either the networks or the studios.

III. SYNDICATION

19. It has been argued that relaxation of our syndication restrictions would raise concerns similar to those discussed above -- network extraction of, or underpayment for, syndication rights, network favoritism of shows in which they own syndication rights, potential loss of program diversity through network curtailment of producers' financial and/or creative independence, and potential manipulation of the off-network syndication market to the disadvantage of independent stations. Thus, in the paragraphs below, we seek specific comment on what ways, if any, the above-discussed proposals for safeguarding against a network's extraction of a financial interest would provide an effective safeguard against similar concerns in the direct network acquisition of syndication rights. In contrast to certain proposals discussed below, commenters should address whether networks should be limited to "passive" participation in syndication profits through their acquisition of financial interests in a program. Comment is also sought on whether the possible extraction of syndication rights is of greater concern than the extraction of a financial interest, given the apparent importance of those rights (particularly foreign rights) to the financing of series pilots and MOWs by independent producers. Finally, commenters are asked to address whether, if the networks are permitted to enter the syndication market, they also should be permitted to acquire passive financial interests.

20. *Foreign Syndication.* The comments and reply comments pay considerable attention to our existing prohibition on network involvement in foreign syndication. Program producer interests remain adamant that the networks should continue to be precluded from engaging in foreign syndication. Other parties, including DOC/NTIA, the Justice Department and the networks, propose that we eliminate the foreign syndication restriction entirely. We believe it would be useful to receive further information to help us assess whether the prohibition affirmatively harms U.S. competitiveness abroad and whether it in fact serves to promote competition in the domestic arena. We accordingly seek comment on whether the restriction can be safely lifted in its entirety at this time, or whether some sort of safeguards would still be needed to protect independent producers from any undue network power.[17] For example, should we adopt a requirement that the producer initiate any discussions over network acquisition of foreign syndication rights? Should networks be allowed to syndicate abroad only those programs (pilots, series, MOWs or specials) which they did not originally broadcast? Those parties who believe foreign syndication safe-

guards should be imposed should discuss the specific problems such safeguards would be designed to address and the appropriate form that the safeguards should take.

21. *Domestic Syndication.* Greater reservations have been expressed in the comments and reply comments with respect to allowing the networks into domestic syndication. Program producers, syndicators, network affiliates and independent television stations all urge us to retain the current restrictions on network participation in domestic syndication. Although the Justice Department asks the Commission to reconsider the need for the domestic syndication prohibition, it supports retaining the restriction if the evidence demonstrates that the networks would behave anticompetitively should the rule be repealed. DOC/NTIA recommends that the networks be permitted to retain a profit participation in future revenues from the domestic syndication of a television program, but also proposes that the networks continue to be barred from actively engaging in the business of domestic syndication. INTV also proposes that the prohibition on active network involvement in domestic syndication be retained, and suggests further that the networks be limited to holding substantially less than a 50 percent passive financial interest in independently-produced programs. FBC would allow the networks to syndicate domestically only the programs they themselves produce. Under FBC's proposal, network affiliates also would not be permitted to receive favored treatment in the syndication of off-network shows.[18]

22. The comments and reply comments contain considerable discussion from those who would retain our domestic syndication rule in its entirety, as well as from those who urge us to repeal the rule altogether. We believe it would be useful, however, to receive additional information on proposals that would modify the domestic syndication prohibition without eliminating it completely. We accordingly seek further comment on whether, as DOC/NTIA suggests, we should permit the networks to acquire so-called "passive" syndication rights (by eliminating the bulk sales requirement) while continuing to bar them from actively engaging in domestic syndication. Under such an approach, distribution of a program into domestic syndication could only be performed by an independent third party, not by a network. In order to better assess the merits of this proposal, we seek comment on how we could define an "independent third party" distributor, and whether we should prohibit the networks from having any direct or indirect financial or ownership interest in such a distributor. Commenters are also invited to address the advantages or disadvantages to the program negotiation process of permitting non-bulk sales of syndication rights.

23. We also note that allegations have been made by program producers in this proceeding that, when producing certain programs in-house, the networks have not sold off the financial interest and syndication rights in those programs for a flat fee, but rather have arranged to receive a continuing flow of revenues for the sale of such rights that is keyed to the success of the programs in syndication.[19] We seek information on whether such arrangements are a widespread industry practice. Moreover, to the extent these arrangements exist, we seek comment on whether they effectively serve to grant the networks financial interests in in-house programming.

24. We also seek comment on whether the best way to address concerns about potential abuses of network power is to prohibit active network involvement in domestic syndication, as DOC/NTIA proposes, or to limit the number and types of programs in which the networks could hold financial interest and syndication rights, as discussed above. In this regard, commenters should address the extent to which a limit on the amount of programming for which a network could acquire syndication rights might be an effective safeguard. Should such limits apply to a network's entire schedule or just to prime time? What percentage of the network schedule should be restricted? Should the networks be permitted to retain syndication rights in those programs that they themselves produce, as FBC proposes? If so, how should "in-house" productions be defined, and should we set a cap on the amount of programming that the networks could produce in-house, as FBC suggests?[20] Commenters are also invited to address whether the networks should be allowed to syndicate programs that were not originally carried on their networks. In addition, so that the networks may be viable participants in foreign co-productions, information is sought on whether they at least should be permitted to acquire domestic syndication rights for those productions.

25. Beyond addressing the concerns similar to those presented in the financial interest context, we invite further comment on possible safeguards against allegations that direct network participation in domestic syndication would result in discrimination against non-affiliates in program syndications. For example, we seek specific comments on the FBC proposal that a network engaged in the business of domestic syndication be presumed not to be favoring its affiliates so long as no more than a certain percentage of its syndication sales were made to those affiliates. What would the appropriate threshold be? In this context, submissions of historical data on network syndication of off-network programs to their affiliates prior to imposition of our syndication limits would be useful. Also, commenters should address whether a network should be allowed to give preferential treatment to its owned and operated stations, or would those stations have to be treated with the same arms-length distance as an affiliate for syndication purposes? Finally, would concerns about affiliate favoritism be abated where a network served as the domestic syndicator of a program in which it did not hold a controlling financial interest (and thus the controlling party would presumably check any network inclination to favor its affiliates)? In the alternative, if networks are permitted to acquire domestic syndication rights, should they be barred from selling off-network programs to their owned and operated stations and affiliates?

26. Nearly all commenters address the separate concern that the networks, if permitted to engage in the business of syndication,[21] may be able to restrict the supply of off-network programming and thereby damage competition in the syndication market. For their part, the networks assert that it would be virtually impossible for them to engage in such a "warehousing" strategy. This position is generally supported by the Department of Justice and the Bureau of Economics of the Federal Trade Commission. Program producers, syndicators and independent station interests, on the other hand, allege that anticompetitive warehousing by the networks is a very real possibility that should not be taken lightly by the Commission.

27. In response to these concerns, several commenters propose that we adopt specific anti-warehousing provisions if we permit the networks to enter domestic or foreign syndication. FBC proposes, for example, that the networks be permitted into domestic syndication only on the condition that they make all network programs available for airing in the syndication market within four years after the initial network exhibition. DOC/NTIA similarly suggests that we require the networks to make available for syndication on a "commercially timely basis" those independently produced programs in which they hold an interest.

28. We seek additional comment on whether an anti-warehousing provision should be adopted in the event we decide to permit the networks to hold syndication rights. In this regard, commenters are asked to address how network incentives and practices would be different from the incentives facing and practices used by the major studios with respect to any possible warehousing behavior. We also request comment on whether an anti-warehousing provision should expressly define the time periods within which a program would have to be made available, or whether it would be sufficient to state that such programs must be made available on a "commercially timely basis," as DOC/NTIA suggests. Commenters are also invited to address the relative merits of an anti-warehousing proposal under which the networks would be required to make programs in which they held interests available for syndication within six months after the end of the network exhibition "run." For series that ran for more than five years, the networks would be required to make the series available no later than the end of the fifth year of the network exhibition.

IV. INTERNATIONAL IMPLICATIONS

29. We note that in recent years, there has been an increased interest by foreign investors in acquiring U.S. production assets. In the past five years, foreign firms have acquired two of the seven major Hollywood studios, as well as a number of smaller television producers. The largest of these foreign acquisitions have included the 1985 purchase of 20th Century Fox Studios by Australia's News Corporation, the 1988 acquisition of MTM productions by TV South of Great Britain, and the 1989 purchase of Columbia Pictures by Sony Corporation of Japan. In addition, two other foreign companies reportedly are now seeking to purchase MGM/UA and MCA.

30. Such foreign investments clearly signal the increasing globalization of the entertainment programming marketplace. In this regard, we are concerned that the Commission's regulations not give foreign entities an unnecessary advantage over U.S. companies in this increasingly competitive market. Accordingly, in order to better understand the roles that U.S. and foreign firms may play, we seek additional information about the forces that are driving the acquisition of U.S. entertainment production assets by foreign entities and whether the pattern of increased foreign investment is likely to continue. We also seek comment on what categories of companies are most likely to acquire production assets and why. Finally, we solicit comment on whether U.S. companies are more or less likely to acquire production assets in the future, assuming that foreign investment continues to increase and our financial interest and syndication rules are not changed.

V. SUNSETTING/REVISITING THE RULES

31. Another issue raised by those commenters proposing significant modifications to our existing rules is whether we should set a specific timetable for revisiting the effectiveness of and continuing need for our regulations. DOC/NTIA recommends that we re-examine any revised rules within three to five years after their adoption.[22] We solicit comment on this proposal. Alternatively, it may be desirable for us simply to adopt a provision that would let the rules sunset after some stated period of time. Such an approach would enable us to avoid the considerable administrative costs of conducting another in-depth analysis of the rules within a fairly short period of time. We therefore solicit comment on whether it would be appropriate to adopt a sunset provision in view of ongoing marketplace developments, and on how such a provision could best be crafted. For example, it may be possible to sunset any rule restrictions after a set period of time (*e.g.*, five years), while preserving the option to review and extend the restrictions in the event competitive media forces and other networks have not fully developed by the sunset deadline. In addition, we seek comment on how any new rules might be sunset according to a measure other than a number of years (*e.g.*, through a decline in the networks' collective audience share or revenues).

VI. NETWORK DEFINITION

32. The financial interest and syndication rule defines the term "network" as: any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated stations in 10 or more states." 47 C.F.R. §73.658(j)(4). It has been argued that this definition is so broad as to inhibit the formation of new networks. We believe it is in the public interest to foster the emergence of new competitive networks which can provide new and diverse choices in programming. At the same time, we recognize that at some point emerging networks must be subject to the same regulatory treatment as established networks. Commenters are requested to address the appropriateness of the existing definition and how it could be modified to deal with emerging networks. For example, should we increase the hours of programming standard in the current definition from 15 to 28 hours per week, since 28 hours would be the equivalent of a seven-day prime time schedule and one hour per day of news? If the existing "number of hours" standard is retained, is there a potential that a network could circumvent that threshold by providing excess programming to its affiliates on a "syndication" rather than "network" basis? If the "10 or more states" standard is inadequate, should it be replaced by a specific requirement of audience reach? If so, should audience reach be measured by either net weekly circulation or average daily viewership? Also, should a precise threshold of the broadcast revenues which a network earns, such as network advertising sales in excess of $900 million, be added to the definition? Finally, what weight should be given to the fact that, by increasing the "number of hours" standard and thus narrowing the current definition of "network," entities such as FBC may be able to amass substantial production assets that could give them substantial competitive advantages in

terms of synergies and other business efficiencies over those companies that continued to be defined as networks under our rules?

VII. EMERGING NETWORKS

33. We note that there is considerable discussion in the record over whether FBC and any other emerging networks should be subjected to whatever financial interest and syndication restrictions we may retain. We believe it would be useful to receive further comment on how the various proposals discussed above should be applied to FBC and other emerging networks. For example, would it be appropriate to apply any revised financial interest rules to emerging networks while adding to the rules a temporary exemption from domestic syndication restrictions (at least as to previously acquired syndication properties)? If so, would it also be appropriate to apply our prime time access restrictions to FBC's and other emerging networks' affiliates at that time (with existing contracts or, as for FBC at least those entered into before grant of its waiver, being grandfathered for a limited period)?[23] Further, we specifically seek comment on whether the factors which led the Commission to grant FBC a limited and temporary waiver earlier this year also support permanent rule dispensations for FBC or other emerging networks. We also seek comment on when, if we chose to amend our rules to exempt FBC or other emerging networks from any remaining rules, we should revisit that decision.

VIII. EFFECT ON PRIME TIME ACCESS RULE

34. The Prime Time Access Rule (PTAR), 47 C.F.R. §73.658(k), limits the amount of network programming and "off-network" programming (programming having formerly appeared on a network) that a network affiliate in the 50 largest markets may broadcast during prime time. We did not propose, and we shall not, revisit or revise the PTAR in this proceeding.[24] We note, however, that the PTAR was adopted at the same time as the financial interest and syndication rules, and that the rules together were intended to foster "[a] healthy syndication industry composed of independent producers." *Amendment of Part 73 of the Commission's Rules*, 23 FCC 2d 382, 386 (1970). We also observe that the PTAR was specifically designed to provide an outlet for independent productions and thereby to enhance diversity in program production. 23 FCC 2d at 394-95. We invite comment on the following questions: Would changes in the financial interest and syndication rules diminish the effectiveness of the PTAR in fostering diverse and independent sources of programming? Would network entry into first-run syndication for the access period threaten, constrict or preempt the outlet for independent producers that the PTAR was intended to provide? If networks are permitted to enter the first-run syndication market, what safeguards or limits, if any, should be placed on their ability to offer first-run syndicated products for broadcast during the prime time access period? If networks are permitted to obtain financial interests in first-run syndicated programs, and those programs are offered during the access period, would that adversely affect the availability of the outlet for independent producers that the PTAR was designed to provide? What safeguards would be necessary to ensure that the networks do not unduly pressure their affiliates to accept first-run programs which the networks syndicate or in which they have a financial interest? Commenters who believe that safeguards or limitations on the networks' involvement with first-run syndicated programming are necessary to preserve the integrity of the PTAR should offer specific proposals for our consideration.

IX. ADDITIONAL COMMENTS/HEARINGS

35. We believe that the commenters in this proceeding have made a number of specific suggestions and observations that warrant further comment and consideration. We are persuaded that several parties have suggested thoughtful regulatory solutions to what is obviously a complicated problem. We accordingly are adopting this Further Notice for the limited purpose of soliciting comment on the specific issues and proposals discussed above. In this regard, parties should not merely repeat arguments or present data that have already been fully discussed in the record. Rather, they should submit additional comments that are focused on the merits of the proposals described in this Notice.

36. The Commission is aware of the concerns of many commenters that resolution of this proceeding not be unnecessarily delayed. Accordingly, comments on the issues raised in this Notice will be due on November 21, 1990, and shall not exceed fifty double-spaced typed pages.[25] Reply comments will be due on December 21, 1990, and shall not exceed twenty-five double-spaced typed pages. No extensions of these dates are contemplated.

37. In view of the complexity of the issues in this proceeding and the variety of proposals now before the Commission, we believe that our assessment of the record would be greatly aided if interested parties also were given an opportunity to present oral testimony on the proposals before the full Commission. We therefore are scheduling one day of *en banc* hearings to receive testimony on the issues raised in this Further Notice. The hearing will be held on December 14, 1990 in the Commission Meeting Room, Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554, from 9:30 a.m. until no later than 5:30 p.m.[26] Parties wishing to respond to testimony presented at the hearing should do so in their reply comments, due December 21, 1990.

38. Parties wishing to make oral presentations at the hearing should submit written requests by close-of-business on November 15, 1990 to Alexandra M. Wilson, Office of the General Counsel, Room 614, Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. Such requests should clearly identify the speaker, the organization represented (if any), any experience and training relevant to the issues to be discussed, and the specific topic or topics to be discussed. We are particularly interested in receiving testimony from persons who have practical experience in the program production and negotiation process through which the networks acquire programming. Depending on the number of requests for time we receive, it may be necessary to limit the number of presenters. If so, we will endeavor to select speakers for the hearing so as to obtain a broad and informed viewpoint. Interested parties are also encouraged to coordinate and/or consolidate their presentations to prevent duplication. All speaker requests will be reviewed and those selected as panelists will be notified.

39. An original and 10 copies of all selected speakers' remarks or draft testimony, including a summary of no more than two pages, should be submitted by November 30, 1990 to the Office of the Secretary, Federal Communications Commission, Room 222, 1919 M Street, NW, Washington, DC 20554. Additional copies should also be submitted to Alexandra M. Wilson, Office of the General Counsel, Room 614, and William H. Johnson, Mass Media Bureau, Room 314, 1919 M Street, NW, Washington, DC 20554. Information submitted at the hearing will be included as a matter of public record in the docket in this proceeding. The precise format and speaker schedule for the *en banc* hearing will be specified in an upcoming Public Notice.

40. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this Further Notice of Proposed Rule Making. The Secretary shall cause a copy of this Further Notice, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, as required by Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 USC Section 601 *et seq.*, (1981)).

41. Authority for issuance of this Further Notice of Proposed Rule Making is contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 USC §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX -- INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action. This Further Notice of Proposed Rule Making is adopted to obtain comment regarding specific proposals to modify the Commission's financial interest and syndication rules. *See* 47 C.F.R. § 73.658(j).

Objectives. The Commission seeks comment on a number of specific proposals developed during the course of the Rule Making proceeding in order to better assess whether it should modify its financial interest and syndication rules in light of marketplace developments.

Legal Basis. The proposed action is authorized under Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 USC §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

Reporting, Recordkeeping and Other Compliance Requirements. None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules. None.

Description, Potential Impact, and Number of Small Entities Involved. Any rule changes in this proceeding could affect television program producers, television networks and their affiliate stations, non-network television stations, cable networks, cable television program producers, cable television networks and cable television operators. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives. The Further Notice solicits comments on a variety of alternatives.

FOOTNOTES

[1] *Order*, FCC 90-99, adopted March 14, 1990.

[2] *Notice of Proposed Rule Making in MM Docket No. 90 - 162*, FCC 90-100, adopted March 14, 1990.

[3] *See Tentative Decision and Request for Further Comments in BC Docket No. 82-345*, 94 FCC 2d 1019 (1983).

[4] *See Notice of Proposed Rule Making in MM Docket No. 90-162* at ¶ 3.

[5] A number of parties, including the Bureau of Economics of the Federal Trade Commission and the Department of Justice, filed reply comments after the formal reply date. In light of the further proceeding now undertaken, these pleadings will be accepted.

[6] We recognize that many commenters may be reluctant to comment frankly on proposals not fully consistent with their fundamental advocacy of either complete retention or repeal of our rules. Those commenters should be assured, however, that the Commission will not view their candid discussion of the relative merits of various mid-range options as any concession of their fundamental position, but rather as a welcome and productive commentary offered solely on an "arguendo" basis.

[7] Orbis Communications, Inc., an independent producer of television programs and a member of the Program Producers and Distributors Committee, filed reply comments in support of the "general thrust" of the FBC proposal. In addition, the Association of Independent Television Stations, Inc. (INTV) supports a separate negotiations requirement similar to that proposed by DOC/NTIA. *See* "INTV's Proposal for Modification of the Network Financial Interest and Syndication Rules," filed October 3, 1990 in MM Docket No. 90-162 (hereinafter "INTV Proposal").

[8] *See* Letter from Barry Diller to Alfred Sikes, March 21, 1990.

[9] There has long been a debate over the "deficits" that program producers allegedly are forced to incur when securing network exhibition for their programs. We seek comment on whether "deficit financing" is an inherent characteristic of the network/studio or network/producer relationship, or whether it is a result of our regulatory prohibition on network acquisition of financial interests and syndication rights. In particular, commenters are asked to address whether deficit financing would disappear if networks were permitted to purchase so-called "back-end" rights.

In addition, to better assess the leverage that the networks might have in certain program negotiations, we seek further information on the audience delivery power of a network today, as compared to the power it possessed in 1970 when our financial interest and syndication rules were first adopted. Specifically, comment is sought on the kind of audience share that a producer whose program is carried on a network is normally expected, given the networks' near universal distribution to U.S. households.

[10] In addition, we note that the networks' consent decrees with the Department of Justice currently prohibit the networks from acquiring options in prime time entertainment programs for longer than four years. These restrictions are set to expire under the decrees in 1995. We seek comment on what ramifications, if any, elimination of the consent decree restrictions on options will have on the negotiating process between networks and producers.

[11] It is unclear from DOC/NTIA's reply comments whether it proposes that negotiations over financial interests should occur after the scheduling of the pilot for a program, or after the scheduling of the program itself. *Compare* DOC/NTIA Reply Comments at 5 and 32. We seek comment on what point in the program production process would be the most logical trigger for purposes of implementing the DOC/NTIA proposal.

[12] *See, e.g.*, "Ex Parte Presentation for Capital Cities/ABC, Inc. re NTIA Proposals in MM Docket No. 90-162 (Fin-Syn)," filed September 11, 1990; "Specific Problems with the NTIA Proposal for New Fin/Syn Regulations," filed by National Broadcasting Company, Inc. on September 21, 1990.

[13] In this regard, we note that the consent decrees entered into by ABC, CBS and NBC that track our financial interest and syndication rules contain several "separate negotiation" provisions, some of which dictate the sequence in which certain negotiations must be held and some of which do not. We invite comment on the success of these provisions in improving network/program producer dealings and whether they have proven practical in real-world negotiations.

[14] In this regard, commenters should explain how this option would effect the concerns addressed by the DOC/NTIA proposal.

[15] *See also* INTV Proposal.

[16] In this regard, we solicit information on whether any such limits we adopt should vary depending on whether the programming at issue is to be aired in prime time or non-prime time.

[17] In this regard, we seek comment on whether the networks could effectively preclude independent producers from benefitting from sales in foreign markets by requiring foreign syndication rights as a condition precedent to network exhibition. If so, what safeguards would be needed to avoid such behavior?

[18] FBC proposes that such favored treatment be demonstrated by a showing that there is a pattern and practice of an unreasonably large percentage of one network's programs being carried on its affiliated stations.

[19] *See* Comments of Coalition to Preserve the Financial Interest and Syndication Rule at 27.

[20] *See also* ¶¶ 11-13, *supra*.

[21] The Coalition to Preserve the Financial Interest and Syndication Rule also alleges that the networks would have the incentive and the ability to warehouse programs even if they only acquired purely passive financial interests in independently produced programs.

[22] DOC/NTIA also recommends that any additional waiver relief granted to FBC be re-examined at that time.

[23] We also seek comment on whether affiliates of other "emerging networks" should be granted limited waivers of the prime time access rules to enable them to complete program carriage contracts that might otherwise violate those rules.

[24] A petition for a declaratory ruling to eliminate the Prime Time Access Rule was filed by First Media Corporation on April 18, 1990. That petition will be considered in a separate proceeding.

[25] Procedures regarding the filing of comments are set forth in Sections 1.415 and 1.419 of the Commission's Rules. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554.

[26] Our ex parte rules for non-restricted Rule Makings apply in this proceeding. *See* 47 C.F.R. § 1.1206.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-54[1]

In re

Amendment of Parts 21, 43, 74,
78, and 94 of the Commission's
Rules Governing Use of the
Frequencies in the 2.1 and 2.5 GHz
Bands Affecting:

Private Operational-Fixed
Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint Distribution
Service,
Instructional Television Fixed
Service, and
Cable Television Relay Service

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1990; Released: October 26, 1990

By the Commission:

I. INTRODUCTION

1. We proposed modifying a number of rules and policies that govern use of the channels that collectively are utilized for provision of "wireless cable" service[2] in a *Notice of Proposed Rule Making and Notice of Inquiry* released on February 22, 1990. [3] In a *Report and Order* [4] adopted in conjunction with this *Further Notice*, we have amended our rules, pursuant to the *Notice*, to simplify the disparate technical, procedural, ownership, and other requirements and restrictions applicable to the microwave channels that are utilized by wireless cable operators so as to facilitate wireless cable service. In this *Further Notice* we seek comment on a number of additional issues, not resolved in the *Report and Order*, related to further improving the rules applicable to wireless cable service.

2. In the *Notice*, we initiated an inquiry as to whether the OFS H channels should be reallocated to MDS, whether the associated response channels should be included in that reallocation, and whether the response channels associated with the MDS and ITFS channels should be reallocated to OFS. In this *Further Notice* we advance the earlier proposed reallocation of the H channels, and we tentatively conclude that it is not an efficient use of spectrum to continue reserving all of the response channels exclusively for MDS and ITFS licensees. We therefore propose reallocating some of these channels to OFS. A number of the channels will remain available for teacher-student dialogue, interactive video systems and other uses.

3. In addition, in analyzing a number of technical and equipment performance issues, we have found it necessary to seek additional comment on the measures necessary and appropriate to require involuntary station modifications. While we have adopted provisions for such changes, as detailed in the *Report and Order*, we request comment on the technical standards and procedural mechanisms that should govern their implementation. We seek additional comment on ways to facilitate the colocation of facilities, such as defining as *de minimis* certain types of modifications and requiring an existing licensee to colocate with another if the requesting operator is willing to bear all the associated expenses. We also request comment on specific procedures to implement the rule changes adopted regarding migration of point-to-point operations on the E and F channels. We seek further comment on the appropriate guidelines under which to permit exceptions to the cable cross-ownership restriction adopted in the *Report and Order*. Finally, we propose a set of rules under which we would authorize the use of currently vacant ITFS channels by non-ITFS entities. We seek comment on that proposal, as well as other options that may better serve our three-fold purpose of utilizing unused spectrum, advancing wireless cable service, and protecting the ability of ITFS services to expand in the future.

4. In all of these considerations, we will be informed by our underlying concern with the critical importance of education, and the significant role that ITFS can play in providing improved educational opportunities for all. As stated in the *Notice*, "we do not intend to jeopardize the current or future ability of ITFS to fulfill its educational potential . . . [and we recognize that] we must take great care not to foreclose these resources." *Notice* at 971-72; *See also Report and Order* at paras. 7, 48. With this uppermost in our minds, we also seek ways to utilize underused and vacant ITFS spectrum and to enhance the service capabilities and competitive viability of wireless cable service, but not in a manner that will harm or undermine the purposes of the ITFS service.

II. DISCUSSION

A. Reallocation of H Channels

5. In the *Notice*, we requested comment on whether the three H channels should be reallocated to MDS from the Private Operational-Fixed Microwave Service (OFS). We recognized the widespread use of H channels for MDS service and specifically sought information on the amount and nature of current and projected non-MDS use of those channels, and the suitability of other spectrum for any such non-MDS uses. *Notice* at 979.

6. Comments on this proposal were in unanimous agreement that the channels should be reallocated as proposed. We must surmise from the lack of dissent that there are no significant non-MDS operations that could not be accommodated on other spectrum. Reallocation should significantly enhance the use of the H channels for MDS service and for use in wireless cable systems. Converting these channels to the same technical and procedural rules as the other MDS channels will considerably ease the administrative and operational burdens associated with use of these channels for MDS operations, both for operators and for the Commission, and this change should increase utilization of these channels. Accordingly,

we propose to modify our rules to specify that channels H1 (2650-2656 MHz), H2 (2662-2668 MHz), and H3 (2674-2680 MHz) are allocated to the MDS service. 47 C.F.R. §§ 21.901, 94.65. We also propose that a subsequent conversion of any such channel to MDS use will initiate the application of MDS rules for that station. We seek comment on whether current licenses or applications for H channels should be grandfathered, subject to and protected by the current OFS rules and eligible for renewal. Our tentative position is that wireless cable entities operating on the H channels should hold MDS licenses, and we seek comment on the least burdensome way to achieve that objective. We also seek comment on whether we should permit grandfathered OFS stations to remain OFS stations after assignment or transfer, unless used in conjunction with other MDS or ITFS stations or the licensee or applicant advises us that it prefers application of the MDS rules.[5]

B. Response Channels

7. In the *Notice*, we recognized that the 125 kHz response channels associated with each of the MDS, ITFS, and OFS channels are infrequently used, and noted that a previous proposal to disassociate the H response channels from their primary channel had been favorably received. We inquired as to the nature and extent of current and potential uses of the response channels associated with the MDS and ITFS channels. *Notice* at 978.

8. Few commenters in this proceeding addressed the issue of re-allocating the H response channels, and only one opposed the proposal, as discussed below. It appears that current use of the MDS and ITFS response channels is very limited. A significant impediment, according to one party, is the current dearth of economical equipment for use on those channels. Most of the comments on this issue, however, stress that the interactive use of response channels holds great potential for MDS and ITFS.

9. ITFS use of the response channels, although not widespread, is very well developed in some systems. Teacher-student dialogue, which requires response capacity, obviously is an integral part of the educational process, and we will proceed with great care in taking any action that has the potential to unduly restrict that capability. Although interactive capability appears to be a potentially significant adjunct to a multichannel video entertainment service as well, we have received few indications that it will soon be offered on a widespread basis. Moreover, as wireless cable develops, it is likely that in any given area the significant portion of the 2.5 GHz video channels would be licensed and/or leased to a single entity to be used in a wireless cable system. It is doubtful, however, that a single operator of a multichannel system would require all of the response channels currently associated with the 2.5 GHz channels that would comprise such a system. Moreover, a reallocation would not prohibit a wireless cable operator, or MDS or ITFS station licensee, from applying for any of the reallocated response channel frequencies if the remaining response channels are deemed insufficient for its system. We therefore tentatively conclude that it is not an efficient use of spectrum to continue reserving all of these channels exclusively for MDS and ITFS licensees when they could be used for other multipoint communications.

10. We propose that the response channels associated with the H channels be disassociated from those channels and remain allocated to OFS. Additionally, we propose that half of the response channels associated with MDS channels and one quarter of those associated with ITFS channels be reallocated to OFS. Specifically, we propose to reallocate ITFS channels A4 (2689.0625 MHz), B4 (2689.1875 MHz), C4 (2689.3125 MHz), D4 (2689.4375 MHz), and G4 (2689.8125 MHz), and MDS channels E3 (2688.5625 MHz), E4 (2689.5625 MHz), F3 (2688.6875 MHz), and F4 (2689.6875 MHz). We tentatively conclude that response channels remaining with the primary channels should be adequate to meet the needs of the wireless cable industry and ITFS licensees in any given area, but we request specific comment on whether more and/or different channels should remain available to these services. We additionally propose that unused response channels associated with primary channels that are in use be available for OFS use by OFS operators. Such operations would be on a co-primary basis with OFS licensees and subject to the same interservice coordination procedures developed for the shared spectrum in the 18 GHz band.

11. Our initial position is that the response channels be made available for multipoint OFS operations. We would entertain comments, however, on whether the response channels would be better suited to point-to-point use or whether both multipoint and point-to-point operations could be accommodated. For purposes of coordination, we propose that all applications for OFS use of the response channels, whether by OFS, MDS, or ITFS entities, be subject to the prior frequency coordination procedures contained in Section 21.100(d) of the Commission's Rules (47 C.F.R. § 21.100(d)). We have found these procedures to be an efficient means of coordinating applications from various services. While these procedures offer protection to both co-channel and adjacent-channel stations, it also may be necessary to employ additional measures to protect adjacent-channel operations. In this regard, we note WCA's argument that reallocating the response channels could create interference problems to ITFS channel G4. Our view is that the response channels should not be treated as a guard band and that appropriate standards can be employed to eliminate adjacent-channel interference, particularly in light of our adoption in the *Report and Order* of standards to improve protection from out-of-band emissions. We therefore request comment on what standards should be applied, and whether the current limitations on out-of-band emissions are sufficient for this purpose.

12. The response channels potentially may be used for audio communications for classroom and other educational work in ITFS, and for customer communications, including customer-initiated services in MDS, as well as for audience and audience-response measuring in that service. A number of commenters, however, suggested that a variety of data and other business services could be provided on those channels if the restrictions on their use were lifted. We reject the argument that the restrictions on types of use should be lifted without a reallocation to enable MDS and ITFS licensees to utilize these channels to produce revenue from operations not related to their primary service. MDS and ITFS entities can compete on an equal basis with all other potential users to utilize any reallocated spectrum for non-MDS and non-ITFS services.

13. Finally, we request comment on whether all existing operations on the response channels should be grandfathered. We note that because the response channels are "associated" with the 6 MHz video channels, many licensees received authority to use them even if

they did not request and do not require such use. Therefore, if we grandfather existing operations, we will have the problem of ascertaining the current uses and users of these channels. We invite comment on on the procedures we should adopt to register existing operations for purposes of achieving grandfathered status, should we grant it, as well as for determining which channels should not be subject to the general reallocation proposed which may be available for OFS use on an individual basis.

C. Involuntary Station Modifications

14. In the *Notice*, we specifically proposed to consider forced upgrades of ITFS operations by new applicants desiring to invoke the 0 dB interference protection standard and in conjunction with the revision of permissible aural power levels. *Notice* at 974, 977. Upon review of the comments in this proceeding, we have found it appropriate to consider forced upgrades and modifications in additional circumstances. *Report and Order* at para. 49. Accordingly, we propose that a station prevented from operating at 100 watts because the higher power will cause adjacent-channel or co-channel interference to another station may upgrade the interfered-with station to eliminate interference. Similarly, we propose that a licensee may upgrade another licensee's facility if the other licensee is unable to meet the revised transmitter tolerance or out-of-band emissions standards promulgated in the *Report and Order*. We further propose that if a licensee (or applicant) is prevented from using a signal booster because it will cause interference to a co-channel or adjacent-channel facility, and if the interference can be prevented by upgrading the interfered-with licensee's facility, the booster operator may upgrade that facility.

15. In all these situations, we propose to condition Commission approval of the initiating party's application upon completion of the upgrade. We also propose that the initiating party be responsible for all necessary upgrades or modifications necessitated by its proposal, not just those it initially causes. For example, if Station A increases its output power to 100 watts, it will interfere with Station B. To counteract this interference, A proposes to upgrade B so that it may also operate at 100 watts. If B increases to 100 watts, however, it will interfere with Station C. Station A is therefore responsible for upgrading Station B, Station C, any station with which C might interfere if its output power is increased, and so on.

16. In addition, we propose that the affected licensee must accept the modification unless it can show that the change would be impracticable. We seek comment regarding what standards should be used to determine impracticability in each of the above situations, and what types of equipment are necessary to achieve the desired result. We also seek comment regarding the initiating party's role; should it merely pay the expenses of the upgrade or modification, or should it be responsible for supervising and performing the upgrade or modification? Finally, we seek comment regarding what residual or continuing expenses will fall upon the upgraded or modified licensee as a result of the modification, and whether, for example, the benefits of increased power outweigh the increased electrical utility costs required to operate at increased power.

D. Colocation of Facilities

17. Colocation of facilities is essential if wireless cable is to become a viable multichannel service provider. Section 21.42 of our rules[6] defines certain types of *de minimis* modifications which do not require an interference analysis or any other showing. We solicit comment on a proposal by Mitchell Communications Corp. that additional types of modifications be added to the list at Section 21.42 of certain modifications not requiring prior authorization. What types of changes should be considered *de minimis* ? What additional steps could be taken to streamline the colocation process while protecting other licensees from interference? We also solicit comment on the suggestion of Hispanic Information and Telecommunications Network, Inc. that an existing licensee be required to colocate if such colocation will not negatively affect its provision of service and another operator is willing to bear all expenses related to colocation, including those costs necessary to protect the existing licensee's facilities and signal. What limitations should be established for forced colocation of an ITFS station? For example, should forced colocation only be permitted where the ITFS transmitter will be moved within a given distance? What standards should apply in determining suitability of the new location? What types of expenses would ensue in implementing this proposal? Should the entity requesting colocation merely pay the expenses of colocation, or should it be responsible for supervising and performing the installation attendant to the colocation?

E. Point - to - Point Migration

18. In Section II-C of the *Report and Order*, we have modified our rules to permit MDS operations to displace ITFS point-to-point operations on the E and F channels, provided that suitable alternative spectrum is available and that the MDS station pays for the migration. *Report and Order* at paras. 29-32. Although we concluded that suitability of spectrum should be determined on a case-by-case basis, we noted that the new spectrum must be licensable on a primary basis (unless migration of a studio-to-transmitter link to other ITFS channels occurs) and that the change must not cause a disruption in service. We also noted that with regard to displacement of primary point-to-point ITFS operations on the E and F channels, that potential expansion may be a consideration in determining whether alternative available spectrum is suitable. *See Report and Order* at para. 31 n.25. We now request comment regarding what factors should be used to evaluate suitability of spectrum in determining whether displacement should occur. For example, what standards should be used to determine whether the alternative frequencies available possess the same or similar reliability and signal quality as frequencies in the 2.5 GHz band? What is the significance of distance limitations in some alternative spectrum that are not present in the 2.5 GHz band, for example when rain attenuation is taken into account? How much deterioration would occur over longer distances? Would those bands be useful in certain situations? Would a minor disruption in service (*e.g.*, one hour) be permissible? Could upgraded equipment solve some of the problems associated with other bands? What other factors should be considered?

F. Operation of Wireless Cable Systems by Cable Entities

19. In Section II-E of the *Report and Order*, paras. 42-43, we prohibited cable systems that are sole providers in their franchise areas from being eligible for a license for an MDS station and from leasing time on MDS or ITFS stations within their franchise areas. At the same time, we stated our intention to create an exception allowing them to do so in portions of their franchise areas that otherwise would remain unserved by wireless cable. We have already determined that an application for an MDS license filed by a cable operator will go on public notice for 30 days, and that if a wireless cable applicant responds to the public notice with a timely filed application that ultimately is found to be grantable, it will be entitled to consideration without regard to the cable operator's application. Upon grant of the wireless cable entity's application, the cable operator's application will be dismissed. *Report and Order* at para. 43.

20. We seek comment regarding what factors should be considered in evaluating the cable operator's application. For example, based on Section 63.56 of the Commission's Rules,[7] we propose that a cable entity applying for wireless cable channels submit with its application a general statement of why the public interest, convenience, and necessity would be served by grant of its application. What guidelines should form the basis for this determination? We also seek comment regarding whether the exception should be limited to areas with fewer than 2,500 residents, as established for telephone companies in Section 63.58.[8] Should the exception also be permitted in areas with fewer than a given number of homes per square mile? If so, how many homes? What other factors should be taken into account? In addition, what information should a non-cable applicant have to provide in order to demonstrate that it will be able promptly to provide service to the area? What ownership considerations should be employed to determine whether an MDS application is held directly or indirectly by a cable system operator within its franchise area? We also seek comment regarding whether existing wireless cable facilities operated by cable television entities should be divested. How many such facilities are currently operational? How many have been granted licenses but are unbuilt? How many applications are pending? Should divestiture be limited to stations not in operation at the time the rule change becomes effective? Should any provision be made for pending MDS applications filed by cable operators? If so, what should be the cut-off date? What other factors should be considered in promulgating a divestiture provision?

21. There also is the possibility that development by cable systems of locally produced programming will create a need for channels such as those available in the MDS, OFS and ITFS services to simultaneously distribute such programming locally to multiple cable headends. In this regard, we request comment on the extent to which cable systems are planning or are likely to implement local programming that requires distribution to multiple points, and whether the existing spectrum available in the CARS service or other spectrum is sufficient and adequate, or whether cable access to these other channels is necessary or desirable. If such use is needed, we request comment on how many channels might be required and whether a specifically limited number of ITFS channels with excess capacity is sufficient to fulfill this demand. We seek specific information regarding any currently operating local cable channels and their method(s) of distribution. Finally, we request comment on limitations regarding type of use that might apply to an exception for cable use of such channels.

G. Use of Vacant ITFS Channels

22. The existing provision for the non-ITFS use of ITFS excess capacity has contributed significantly to the expansion of ITFS service, as wireless cable operators have assisted in the application for construction of many ITFS facilities. Nonetheless, a number of ITFS channels remain unused in many markets, especially outside the top 30 or 40 television markets. As observed in the *Notice*, these unused frequencies benefit neither the educational community nor the public at large, and are not accessible to wireless cable operators even on an excess capacity basis. We therefore raised the question of whether some of these channels should be made available to non-ITFS entities, subject to restriction and obligations that would ensure their continued availability for ITFS use as well, and, if possible, would assist in the initiation of new ITFS services. We sought suggestions for procedures and regulations that would achieve these ends. *Notice* at 979. It was not our intent then, nor is it now, to effect a removal of any portion of the ITFS spectrum from ITFS use or to foreclose potential future ITFS uses of that spectrum.

23. Only a few of the commenters, representing wireless cable and potential wireless cable operators, embraced the proposal for vacant ITFS channels. The majority of commenters, ITFS entities, strongly objected to any non-ITFS use of the ITFS channels. Their arguments for the most part, however, are premised on a concern that we might reallocate the ITFS spectrum or otherwise foreclose the continued expansion of ITFS systems. They variously argue that permitting non-ITFS use without the condition of a lease will deprive ITFS entities of the opportunity to engage the aid of wireless cable operators in constructing their facilities and will eliminate excess capacity as a source of revenue, that educational institutions cannot compete with commercial entities for use of spectrum, and that they will be unable to secure access to facilities from non-ITFS licensees.

24. We recognize that the use of ITFS as an educational tool is growing, and we hope that it will continue to do so. Some of this growth is due to the mutually beneficial operating arrangements that have been forged in response to our decision to permit ITFS licensees to lease the excess capacity of their systems. We also recognize that it is in the areas with the least current use of ITFS channels that one of the primary benefits of ITFS use is most important -- access to quality educational materials for a variety of widely-scattered individuals. With these concerns in mind, we believe that a carefully balanced approach to permitting non-ITFS entities access to a limited number of vacant ITFS channels, with clearly articulated safeguards intended to protect long-term ITFS growth, could benefit both the educational community and wireless cable operators. The following proposal reflects these considerations. We invite commenters to offer alternatives to or variaitons on our proposal, consistent with our stated purposes.

25. First, we will not permit the last remaining ITFS channels to be used by non-ITFS entities. In order to preserve an opportunity for at least two different institutions to apply for ITFS facilities in the future, we propose to require that eight ITFS channel be left vacant in a community, but that a non-ITFS entity may apply for use

of vacant channels beyond those eight.[9] We ask whether we should limit a non-ITFS applicant to a total of eight ITFS channels. These channels, available full-time, should provide considerable capacity, and be at least equivalent to what other wireless cable operators have available from excess capacity leases.

26. We propose that such applications be on ITFS application forms, with ITFS application requirements and procedures followed, except for the eligibility requirement. We propose to put such applications on a 60-day cut-off period for the filing of mutually exclusive ITFS applications. Mutually-exclusive non-ITFS applications must be filed on the same day to be considered, however, pursuant to the rule adopted for MDS applications. *See Report and Order* at para. 90. Non-ITFS licensees of ITFS facilities will be entitled to the MDS protected service area. Should we limit eligibility to only those entities that already hold licenses or leases for a minimum number of MDS/MMDS channels in the same area?

27. ITFS applicants will continue to have priority of access to this spectrum and may file applications for all vacant ITFS channels. They should not, however, file applications mutually exclusive with non-ITFS applications unless no other suitable vacant channels are available. If no vacant channels are available, they may file with the Commission an application for access to the operating non-ITFS channels. Their eligibility will be judged as if they were filing for their own channels.[10] If their application is granted, the non-ITFS licensee must provide them with access to its facilities. In order to provide some certainty to all parties, we propose to permit the ITFS entity to use the system without limitation from 8:00 a.m. to 4:00 p.m., Monday through Friday. In order to provide some flexibility to respond to individual needs, we also propose that the parties can negotiate for a different distribution of hours, limited to 8:00 a.m. to 10:00 p.m., Monday through Saturday. While we propose that an ITFS operator must use 40 hours per week on each channel before requesting access to additional channels, it may use more than 40 hours if agreed to by the MDS licensee. We propose to require ITFS applicants to seek only as many channels as they can fully utilize for at least 30 hours per week. This will provide an opportunity for the largest possible number of institutions to avail themselves of the facilities. In order to further ensure the opportunity for ITFS entities to use facilities built for ITFS channels, we propose that non-ITFS licensees be required to provide and install up to four receive sites for each channel utilized by an ITFS entity. We seek comment on what other qualifications may be appropriate to set a definite upper limit on the MDS station's financial exposure for such a requirement. In order to permit orderly transition, we propose that the licensee will not be required to provide for the ITFS service until 30 days after the ITFS service is authorized.

28. These provisions should expand the opportunities for wireless cable operations in a number of markets. At the same time, they will provide for the construction of facilities available to educational institutions for ITFS service. While this may deprive some educational institutions of the opportunity to derive revenues from excess capacity leases, it is not evident that there was much such opportunity in those markets to begin with. On the other hand, by increasing the development of wireless cable service generally, this initiative could present opportunities for excess capacity leasing by additional wireless cable systems that might otherwise never occur. At the very least, it should provide for the construction of facilities that can be readily used by educational institutions, something they do not currently have in those communities.

29. Commenters opposed to these proposals should address their remarks to specific provisions and clearly state their concerns with each provision. All commenters are encouraged to propose alternative provisions which can advance the Commission's dual goals of utilizing vacant spectrum for wireless cable service and protecting the present and future interests of existing and potential ITFS operators.

III. ADMINISTRATIVE MATTERS

A. Ex Parte Considerations

30. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 CFR 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

31. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation must provide, on the same day it is submitted, two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary and must be labeled or captioned as an *ex parte* presentation.

32. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide, on the day of the oral presentation, an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

B. Comment Information

33. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 26, 1990,** and reply comments on or before **December 19, 1990.** Extensions of these time periods are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

C. Initial Regulatory Flexibility Analysis

34. *Reason for the Action:* This proceeding was initiated to review, simplify, and update, wherever possible, the disparate technical, procedural, ownership, and other requirements and restrictions applicable to MDS, OFS, and ITFS stations.

35. *Objective of this Action:* The actions proposed in this *Further Notice,* together with the actions adopted in the companion Report and Order in this proceeding, are intended.to improve wireless cable service by making the regulations governing that service as easy to comply with as possible, and as relevent as possible to the technology and conditions now existing in the wireless cable service.

36. *Legal Basis:* Authority for the actions proposed in this *Further Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

37. *Number and Type of Small Entities Affected by the Proposed Rule:* Approximately 16,000 existing and potential wireless cable operators would be affected by the proposals contained in this decision.

38. *Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:* One of the proposals suggested in this *Further Notice* would require that all applications for use of Operational-Fixed Microwave Service (OFS) response channels be subject to the precoordination procedures contained 47 CFR § 21.00(d). The Commission has found these procedures to be an efficient means of coordinating applications from various services.

39. Additionally, we are proposing involuntary station modifications not only as recommended in the in the *Notice* for applicants desiring to invoke the O dB interference protection standard and with respect to revision of permissible aural power levels, but in additional circumstances as well.

40. *Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:* None.

41. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:* The proposals contained in this decision are meant to simplify and ease to the most reasonable extent possible, the regulatory burden currently place on wireless cable operators.

42. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

D. Paperwork Reduction Act Statement

43. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

E. Ordering Clause

44. Accordingly, IT IS ORDERED that pursuant to Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, this *Further Notice of Proposed Rulemaking IS ADOPTED.*

F. Additional Information

45. For additional information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792; Lynne Milne, Common Carrier Bureau, (202) 634-1772; or Mike Lewis, Private Radio Bureau, (202) 632-6940.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] General Docket No. 90-54 also includes issues raised and comments filed in PR Docket No. 88-191 and Gen. Docket No. 80-113. The former was terminated on February 8, 1990, *Report and Order* in PR Docket No. 88-191, 5 FCC Rcd 1220, and the latter was terminated in a companion decision adopted today (see n.4, *infra).*

[2] For purposes of this proceeding, references to "cable" systems, services or operators refer to systems that deliver their signals to subscribers by a closed transmission system, such as coaxial cable, optical fiber or other wireline, as opposed to over the airwaves. In contrast, "wireless cable" uses the airwaves to provide subscribers with multiple channels of video entertainment and informational programming in conjunction with the standard broadcast television signals they already receive. *See Report and Order, infra,* note 4, at para. 2. By use of the term "wireless cable," we do not intend to suggest that these services constitute "cable" service for statutory or regulatory purposes.

Although the type of programming provided by wireless cable service resembles that provided by cable service, wireless cable uses microwave radio channels rather than coaxial cable or other wireline transmission carrier device to deliver its programs to subscribers. The channels available to wireless cable operators are those in the Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS). In addition, channels in the Private Operational-Fixed Microwave Service (OFS) may be used, and channels in the Instructional Television Fixed Service (ITFS) can be leased on a part-time basis.

[3] *Notice of Proposed Rulemaking and Notice of Inquiry* in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 971 (1990) *(Notice)*.

[4] *Report and Order* in Gen. Docket Nos. 90-54, 80-113, FCC 90-341, adopted October 11, 1990 *(Report and Order)*.

[5] Pending completion of this Rule Making, an H-channel applicant may seek a waiver of the Part 94 technical rules to conform its application to the technical requirements of the Part 21 MDS rules. Action on any such application will, of course, be conditioned on the outcome of this *Further Notice*.

[6] 47 C.F.R. § 21.42.

[7] 47 C.F.R. § 63.56.

[8] 47 C.F.R. § 63.58.

[9] There are very few ITFS channels available in the top 25 television markets, and there is little we can do to affect those markets. In the next 25 markets there are a handful of markets with more than a few channels available. In the next 25 markets, however, about half have more than eight vacant ITFS channels, and several of those markets have no ITFS use at all.

[10] We propose that waiver requests to exceed the four-channel limitation (47 C.F.R. § 74.902(d)) will be considered on the same basis as if there were no non-ITFS operations on the ITFS channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO Letter 12 Errata
Released October 26, 1990
Responsible Accounting Officers

Re: Attestation Audits pursuant to the Joint Cost Order and Joint Cost Reconsideration Order (CC Docket 86-111)

ERRATA

Released: October 26, 1990

The revised RAO Letter 12 released October 23, 1990, did not make clear that the additional audit work to be performed would apply to audits of 1990 operations.

The first sentence of the second paragraph should read as follows:

> Based on our review of the results of these audits of the carriers' 1988 and 1989 operations, we have concluded that additional work in examining source data and testing of allocation procedures and reported results should be performed in audits of the carriers' 1990 operations in order to fully satisfy the Commission's requirements.

The first sentence of the third paragraph should read as follows:

> We hereby direct the carriers to have these audits performed and submit the resulting opinion letters with the FCC Reports 43-03 covering 1990 operations, which are due at the Commission on April 1, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material To Be Filed with
January 1, 1991 Access Tariff Revisions

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1990; Released: October 24, 1990

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. This Order establishes certain requirements for summary cost support material, and a schedule and procedures, that local exchange carriers (LECs) must follow in filing, on November 1, 1990, modifications to their access tariffs. These filings, in partial fulfillment of the requirements established in Sections 61.38 and 61.41 through 61.49 of the Commission's Rules, 47 C.F.R. §§ 61.38, 61.41-61.49, will be effective January 1, 1991, and will reflect two recent Commission decisions. First, the regional Bell Operating Companies (RBOCs)[1] and GTE Telephone Operating Companies (GTOC) are required, and other LECs may elect, to modify their tariffs to reflect the Commission's *LEC Price Cap Order*.[2] Second, all LECs must modify their tariffs to target the rate of return that the Commission adopted in its *Represcription Order*.[3] In conformance with the Commission's direction, this Order narrowly restricts the modifications LECs are to file on November 1, 1990. Carriers are free to make other changes to their tariffs, consistent with Commission rules and regulations, at any other time of the year.[4]

2. Based on the two Commission decisions noted above, we are adopting the attached Tariff Review Plans (TRPs) for price cap and rate of return carriers for this mid-year filing. Specific data formats are detailed in the TRPs, and are appended to this Order. The TRPs display basic tariff support information in a manner that is consistent for all LECs, thereby aiding review by the Commission and interested parties of the LECs' required access tariff filings.

3. As we have noted in previous TRP Orders,[5] the LECs' ability to provide cost, demand, and revenue data varies depending on the size of the company.[6] In the *1990 TRP Order* we altered slightly the definitions of Tier 1 and Tier 2 companies, to apply to Tier 1 and Tier 2 companies the same criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies.[7] For rate of return carriers, we are retaining those definitions.

II. THE TARIFF REVIEW PLAN

4. The only changes that will be permitted in the LECs' November 1, 1990, filing are the following: the retargeting of rates to the 11.25 percent authorized rate of return established in the *Represcription Order;* and changes in long term support (LTS) payments resulting from the new rate of return. For price cap LECs, these changes will be reflected in their Price Cap Indexes (PCIs) as described below. Rates will then be adjusted to meet the price cap rules. For rate of return LECs, these changes will be accomplished by the use of a rate adjustment factor (RAF), computed as described below. No other modifications will be permitted. In this Order, we discuss the most important changes in TRP requirements. Attachment A provides TRP forms for price cap LECs; Attachment B provides TRP forms for rate of return LECs.

A. Price Cap LECs' TRP

5. As noted above, the tariff modifications required in the November 1, 1990 filing are strictly limited. For the RBOCs and GTOC, and any other LEC electing incentive regulation, these changes are as follows.

6. For price cap carriers, all indexes are initialized at a value of 100 as of July 1, 1990.[8] Thus, the PCI, Actual Price Index (API), and Service Band Indexes (SBIs) in all baskets have a value of 100 on that date. The upper and lower bands for all service categories are set at 105 and 95, respectively, for all categories on that date.

7. There are two categories of adjustments which are being made to the PCI with this filing. The first reflect disallowance adjustments made in the *July 2 Order*,[9] the *October 3 Order*,[10] the *New York Telephone Order*,[11] and the *GTOC Order*.[12] To compute the effect of these on the PCIs, companies should compute the change in forecasted July 1, 1990 to June 30, 1991 revenue requirement due to these changes. This change should then be divided by the revenue computed by multiplying July 1, 1990 rates by forecasted July 1, 1990 through June 30, 1991 demand.

8. The second category of adjustments which are being made to the PCI are regulatory changes being made on January 1, 1991. These include the reduction in the rate of return to 11.25 percent and the changes in long term support that result from the represcription of the rate of return.[13] Changes in long term support amounts will be provided to the companies by NECA. LECs should assume, in filing this limited TRP data, that earnings to date in this access period are at the authorized target. Changes due to the represcription of the rate of return will be computed as follows.

9. Companies will use the forecasted July 1, 1990 through June 30, 1991 rate base, as adjusted by the disallowance adjustments in the *July 2 Order* and the *October 3 Order*, as a basis for computing the dollar amount of the effect of the rate of return represcription. This dollar amount will also include the federal, state, and local income tax effects.

10. To compute the percent change in the PCI from the rates resulting from the *October 3 Order* to January 1, the companies should sum the dollar amounts of the effect of the rate of return represcription and the changes in long term support, and divide this sum by the sum of the revenue computed by multiplying rates resulting from the *October 3 Order* by forecasted July 1, 1990 through June 30, 1991 demand as adjusted through the *October 3 Order*. The PCI as of January 1, 1991 is then computed by

multiplying 100 by one plus the percent change due to the disallowance adjustments and then by one plus the percent change due to the January 1 changes.

11. This change in the PCI on January 1, 1991 implies a change to the upper and lower bands on the service categories. Effective July 1, 1990 these bands were set at 105 and 95. These numbers will be adjusted upward or downward on January 1, 1991 by the percentage change in the PCI from its July 1 value. For example, if the PCI on January 1 is 98, implying a 2 percent reduction in the PCI, the service bands would also be reduced by 2 percent, to 102.9 and 93.1. If a company has reduced its rates between July 1, 1990 and the time of this filing to a level that would take an SBI below its January 1 lower band, and has supported that filing with the cost support required for rate of return carriers, no further price cap below band filing cost support is needed. The lower band in such a case will be the January 1, 1991 value of the SBI.

B. Rate of Return LECs' TRP

12. The filing for rate of return LECs is similarly circumscribed. Except as noted below, Tier 2 TRPs will closely resemble Tier 1 TRPs.[14] The allowable tariff modifications for all rate of return carriers are for the rate of return represcription and for changes in LTS.

13. As discussed above, the *Represcription Order* established a new authorized rate of return, and the LECs' November 1, 1990 filings must target access rates to this new level. For purposes of this filing, LECs will use the data they filed in their annual TRPs filed April 2, 1990, as adjusted by disallowances made in the *1990 Access Tariff Order* and in the other Bureau or Commission actions mentioned above, as the basis for the rate of return adjustment. Companies will use the forecasted July 1, 1990 through June 30, 1991 rate base, as adjusted by the disallowance adjustments in the *July 2 Order*, the *October 3 Order*, and the *New York Telephone* and *GTOC Orders*, as a basis for computing the dollar amount of the effect of the rate of return represcription. This dollar amount should also include the federal, state, and local income tax effects. Companies should then divide this amount by the July 1, 1990 through June 30, 1991 revenue requirement, as adjusted by the orders mentioned above. This will give a percentage change in rates, which will be applied as a RAF to the companies' rates.

III. GENERAL INSTRUCTIONS

14. The following general instructions apply to both price cap and rate of return LECs. Except for the section entitled "Geographic Aggregation," the following general instructions also apply to NECA.

A. Application of This Order

15. The filing schedule and the requirement that LECs update their rates applies to all LECs access tariffs, both Tier 1, and Tier 2. NECA is required to file revisions updating the tariffs it files on behalf of its pool members, but because of its special circumstances as pool administrator and other individual responsibilities, is not required to submit the information supporting its filing in the precise form described in this Order. NECA should use the method outlined in this Order to assure consistency with the other filings and should provide support material equivalent to that required for other tariffs, or information complying with Section 61.38 of the Rules. In order to allow LECs to revise CCL and EUCL rates properly, NECA shall also calculate long term support (LTS) amounts and furnish such data to the LECs for inclusion in their filings.

B. Errata

16. As we have noted in the past, the submission of incorrect cost suport data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the notice period.[15] In previous TRP Orders, we required that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we required that, if such a request were refused, it would be required that rates supported by the erratum be refiled upon adequate notice, regardless of whether these rates differ from the rates as originally filed. We continue to believe that the special permission requirement is a reasonable means of encouraging improvement in the quality of data submitted in the annual access filings. We also believe it facilitates the tariff review process.

17. We continue to require that carriers file a request for special permission with any erratum that is filed to correct errors or otherwise revise their access tariff support data. If such a request is refused, the carrier must refile the rates that are supported by the erratum, regardless of whether these rates differ from the rates as originally filed. These requirements pertain to all data filed in support of access charges, including all data that is required by the TRP. All TRP data must be filed on November 1, 1990, and must be accurate and complete.

C. Certification

18. NECA and the LECs must certify the accuracy of data that is submitted in support of rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of revised rates, including all data that is required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order* [16] and the *1988 TRP Order*.[17] The certification should be displayed as the last page in the binder containing each company's TRP.

D. Geographic Aggregation

19. All information required by the TRP must be displayed on the level of geographic aggregation to which the particular LEC's 1990-91 rates pertain. In addition, for rate of return carriers, if the tariff rates are based on data from a number of study areas or operating companies, levels of aggregation associated with each study area (state) and operating company should be provided. Carriers need not aggregate the data above the tariff filing level.

E. Waivers

20. No applications for waiver will be considered. In previous annual access tariff filings, commenters have requested that carriers be allowed to file data under proprietary protection. As in previous years, we are not persuaded that any data required by this TRP requires proprietary protection.

21. Companies must populate all fields of the charts in the TRP which do not have N/As, with one exception. In the price cap TRP, Columns A, B, and C of chart RTE-2 display rates for various access elements. Those companies which have more than one rate for an access element listed in the rows of this chart (because, *e.g.*, they have initial and additional rates, or because they have rates which vary if there is a term plan) may populate Columns A, B, and C of chart RTE-2 for these rows with N/A.

F. Technical Requirements

22. Price cap and Tier 1 rate of return companies are required to file their TRPs in computerized form.[18]

G. Compliance with the Paperwork Reduction Act

23. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the Office of Management and Budget (OMB) form number and date on the formats included with this Order. We also note that this filing is necessary to effect the Commission's two recent Orders regarding the represcription of authorized rate of return and the initiation of incentive regulation for LECs.

IV. CONCLUSION; PROCEDURAL REQUIREMENTS

24. This Order will be sent directly to all carriers that will file access tariffs on November 1, 1990, and a copy will also be sent to NECA. A copy of the Order and all attachments will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. While the Commission will distribute copies of the main text of this Order, those parties wishing to obtain copies of Attachments A and B can do so only through the Commission's contractor for public records duplication, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20037.

25. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description and Justification. Each TRP should be arranged by study area rather than by chart. Each company should file copies of its TRP on or before November 1, 1990 and according to the instructions in Attachment C.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] The RBOCs are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (SWB), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West).

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order*).

[3] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315, adopted Sept. 19, 1990 (*Represcription Order*).

[4] *But see* Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, Report and Order, 2 FCC Rcd 6447 (1987) at 6458 (para. 104).

[5] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364 (Com.Car.Bur. 1990) (*1990 TRP Order*).

[6] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133, released Jan. 25, 1985 (*January 25 Public Notice*).

[7] *1990 TRP Order*, 5 FCC Rcd at 1364 (para. 4). We stated that Class A companies, and thus Tier 1 companies, are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies, and thus Tier 2 companies, are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification are made if annual operating revenue shows a greater or lesser classification for five consecutive years.

[8] *See LEC Price Cap Order*, Appendix F at 1.

[9] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Order, DA 90-887, released July 2, 1990 (*July 2 Order*).

[10] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-1303, released Oct. 3, 1990 (*October 3 Order*); Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990 Access Tariff Order*), *recon. & appl. for rev. pending*. We stated LECs could file on October 17, 1990 revised tariffs reflecting permitted adjustments. *See October 3 Order* at para. 7. We have received several formal and informal requests for waiver of that filing date. *See, e.g.*, Letter from John Litchfield, Ameritech, to Secretary, Federal Communications Commission, October 17, 1990. In view of the closeness of that filing date to the November 1, 1990 filing date for TRPs, the LECs may incorporate these revisions in their TRPs to the extent that they chose to do so rather than filing them separately on October 17, and we waive the requirement of an October 17 filing. Accordingly, the TRPs of those LECs that did not file these adjustments on October 17 may include the corrected figures, without further support data or special permission.

[11] New York Telephone Company Trans. Nos. 1061 and 1074, Order, DA 90-1236, released Sept. 25, 1990 (*New York Telephone Order*).

[12] GTE Telephone Operating Companies Trans. No. 616, Order, DA 90-1237, released Sept. 19, 1990.

[13] Because July 1, 1990 rates already reflect the half year effect of the January 1, 1991 forecasted change in the long term support, no adjustment is needed in this filing to reflect this forecasted change. Companies should reflect only that change in LTS which results from the represcription of the rate of return to 11.25 percent.

[14] Because the *October 3 Order* establishes disallowances for Tier 1 carriers only, as discussed below, the Tier 2 TRPs will not reflect any disallowances. *See* rate of return TRPs at Attachment B.

[15] *See, e.g., 1990 TRP Order* at para. 31.

[16] *See* Annual 1987 Acess Tariff Filings, Petitions for Waivers of Filing Requirements, Memorandum Opinion and Order, Mimeo No. 6945, released Sept. 16, 1986 *(1987 Waiver Order)*.

[17] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554, released Oct. 3, 1988 *(1988 TRP Order)*.

[18] *See 1990 TRP Order*, 5 FCC Rcd at 1368-69 (para. 39).

Attachment A

PRICE CAP

TARIFF REVIEW PLAN

Approved by OMB
3060-0460
Expires 01/22/91
See below for information regarding public burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their January 1, 1991 access charge tariff filings in partial fulfillment of Section 61.38 and Section 61.41 through 61.49 of the Commission's Rules. The TRPs specify basic cost and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to determine whether the services offered are just and reasonable as required by the Communications Act of 1934, as amended. Your response is mandatory.

Public reporting burden for this collection of information is estimated to average 50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

TARIFF REVIEW PLAN DATA GUIDELINES

1. ALL AMOUNTS ARE TO BE IN WHOLE NUMBERS EXCEPT AS SPECIFIED ON A PARTICULAR TABLE.

2. ALL PERCENTAGES ARE TO BE CARRIED OUT TO 2 DECIMAL PLACES EXCEPT WHERE NOTED ON A PARTICULAR TABLE. EXAMPLE; 29 2/3 PERCENT SHOULD BE SHOWN AS 29.67

3. ALL RATIOS ARE TO BE CARRIED OUT TO 4 DECIMAL PLACES EXCEPT WHERE NOTED ON A PARTICULAR TABLE.

4. ALL FOOTNOTES, ADDITIONAL TO THOSE PREPRINTED ON FORMS, SHOULD BE PUT ON A SEPARATE FOOTNOTED PAGE AND INSERTED FOLLOWING THE FORM THEY REFERENCE. THE FOOTNOTE PAGE SHOULD INCLUDE THE COMPANY, STUDY AREA AND FORM TO WHICH THEY PERTAIN.

RULES FOR SUBMISSION OF DATA TO FCC ON MAGNETIC MEDIA

(FOR PRICE CAP AND TIER 1 NON-PRICE CAP COMPANIES ONLY)

1. ALL DATA SHOULD BE SUBMITTED ON 5.25 INCH PC FLOPPY DISKS DOUBLE SIDED DOUBLE DENSITY.

2. ALL FILES SHOULD BE CODED IN ASCII.

3. ALL FILES FOR A FILING ENTITY, I.E. STUDY AREA, OPERATING COMPANY, OR HOLDING COMPANY, SHOULD BE CONTAINED ON A SEPARATE DISK(S).

4. A SEPARATE FILE SHOULD BE PREPARED FOR EACH SEPARATE TABLE OF DATA, E.G., EXG-1, SUM-1, T1WS-1, ETC. THE FILE NAME, FOR EACH TABLE, IS A COMBINATION OF COSA (CO = COMPANY, SA = STUDY AREA, E.G., THE COSA FOR PACIFIC BELL OF CALIFORNIA IS PTCA) PLUS THE TABLE NAME. THE TABLE NAME IS THE TABLE NAME WITHOUT THE HYPHEN, E.G. THE TABLE NAME FOR EXG-1 IS EXG1. THE TABLE NAMES FOR THE RATE OF RETURN CARRIERS EXCLUDE 'T1' OR 'T2', E.G. THE TABLE NAME FOR T1WS-1 IS WS1.

   FOR EXAMPLE, THE FILE NAME FOR TABLE EXG-1 FOR PACIFIC BELL-CALIFORNIA SHOULD BE PTCAEXG1.

5. EACH DATA FILE SHOULD CONTAIN ONLY TABLE ROW NUMBERS AND THE APPROPRIATE NUMBER OF DATA ITEMS PER ROW. DATA MUST BE DELIMITED BY EITHER A COMMA OR SPACE, E.G.:

   FILENAME PTCAEXG1 [FILE FOR PACIFIC BELL, TABLE SUM-1]
   100,12345,12356,12367
   110,10010,10021,10032

   ETC.

   - OR -

   100 12345 12356 12367
   110 10010 10021 10032

   ETC.

6. ANY DATA ITEM FOR WHICH NO VALID DATA EXISTS FOR A PARTICULAR FILING ENTITY SHOULD BE POPULATED WITH -99999. IF THE DATA ITEM IS A TRUE ZERO, THEN A 0 (ZERO) SHOULD BE ENTERED.

7. ANY NON-NUMERIC DATA MUST BE ENCLOSED IN QUOTATION MARKS. E.G. DATE FIELD IN EXHIBIT T1WS-3 MUST BE SHOWN AS "07/16/90".

FILING ENTITY:

SUM-1
Page 1.1 of 1

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
PRICE OUT
($000)

		BASE PERIOD DEMAND X 7/1/90 RATES (A)	BASE PERIOD DEMAND X CURRENT RATES (B)	BASE PERIOD DEMAND X PROPOSED RATES (C)
	COMMON LINE BASKET			
100	END USER COMMON LINE			
110	CARRIER COMMON LINE			
120	TOTAL COMMON LINE			
	TRAFFIC SENSITIVE BASKET			
130	LOCAL SWITCHING			
140	LOCAL TRANSPORT			
150	INFORMATION			
160	TOTAL SWITCHED ACCESS			
	SPECIAL ACCESS BASKET			
170	VOICEGRADE, WATS, METALLIC, & TELEGRAPH			
180	AUDIO & VIDEO			
190	HIGH CAP & DDS			
200	WIDEBAND			
210	TOTAL SPECIAL ACCESS			
	INTEREXCHANGE BASKET			
220	TOTAL INTEREXCHANGE			

FILING ENTITY:

SUM-1
Page 1.2 of 1

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
PRICE OUT
($000)

		PCI	API	SBI	UPPER SBI LIMIT	LOWER SBI LIMIT
		(D)	(E)	(F)	(G)	(H)
	COMMON LINE BASKET					
100	END USER COMMON LINE	N/A	N/A	N/A	N/A	N/A
110	CARRIER COMMON LINE*		N/A	N/A	N/A	N/A
120	TOTAL COMMON LINE		N/A	N/A	N/A	N/A
	TRAFFIC SENSITIVE BASKET					
130	LOCAL SWITCHING	N/A	N/A			
140	LOCAL TRANSPORT	N/A	N/A			
150	INFORMATION	N/A	N/A			
160	TOTAL SWITCHED ACCESS			N/A	N/A	N/A
	SPECIAL ACCESS BASKET					
170	VOICEGRADE, WATS, METALLIC, & TELEGRAPH	N/A	N/A			
180	AUDIO & VIDEO	N/A	N/A			
190	HIGH CAP & DDS	N/A	N/A			
200	WIDEBAND	N/A	N/A			
210	TOTAL SPECIAL ACCESS			N/A	N/A	N/A
	INTEREXCHANGE BASKET					
220	TOTAL INTEREXCHANGE			N/A	N/A	N/A

* FOR ROW 110(D), SHOW HYPOTHETICAL CAPPED CCL PER MINUTE RATE, I.E., CCL MOU RATE FROM SECTION 61.46(d) OF THE RULES.

FILING ENTITY:

RTE-1
Page 1 of 10

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
COMMON LINE BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES
		(A)	(B)	(C)	(D)
	END USER COMMON LINE				
100	MULTILINE BUSINESS EUCL				
110	RES & SINGLE LINE BUS EUCL				
120	LIFELINE				
130	SPECIAL ACCESS SURCHARGE				
	CARRIER COMMON LINE				
140	TERMINATING CCL PREM				
150	TERMINATING CCL NON-PREM				
160	ORIGINATING CCL PREM				
170	ORIGINATING CCL NON-PREM				
180	TOTAL BASKET	N/A			

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
TRAFFIC SENSITIVE BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)
	LOCAL SWITCHING SERVICE CATEGORY					
200	PREMIUM SWITCHING LS1					N/A
210	PREMIUM SWITCHING LS2					N/A
220	NON-PREM SWITCHING					N/A
230	EQUAL ACCESS					N/A
240	OTHER SWITCHING	N/A				N/A
250	TOTAL SERVICE CAT	N/A				N/A
260	SBI	N/A	N/A	N/A	N/A	XX.XX
270	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	XXX.XX
280	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	XX.XX
	LOCAL TRANSPORT SERVICE CATEGORY					
	PREMIUM LOCAL TRANSPORT:					
290	LOCAL TRANS - MB1					N/A
300	LOCAL TRANS - MB2					N/A
310	LOCAL TRANS - MB3					N/A
320	LOCAL TRANS - MB4					N/A
330	LOCAL TRANS - MB5					N/A
340	LOCAL TRANS - MB6					N/A
350	LOCAL TRANS - MB7					N/A
360	LOCAL TRANS - MB8					N/A
370	LOCAL TRANS - MB9					N/A
380	LOCAL TRANS - MB10					N/A
390	MMUC PER LINE OR TRUNK					N/A
400	TERMINATION					N/A
410	FACILITY					N/A

FILING ENTITY:

RTE-1
Page 3 of 10

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
TRAFFIC SENSITIVE BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)
	LOCAL TRANSPORT SERVICE CATEGORY (CONTINUED)					
	NON-PREM LOCAL TRANSPORT:					
500	LOCAL TRANS - MB1					N/A
510	LOCAL TRANS - MB2					N/A
520	LOCAL TRANS - MB3					N/A
530	LOCAL TRANS - MB4					N/A
540	LOCAL TRANS - MB5					N/A
550	LOCAL TRANS - MB6					N/A
560	LOCAL TRANS - MB7					N/A
570	LOCAL TRANS - MB8					N/A
580	LOCAL TRANS - MB9					N/A
590	LOCAL TRANS - MB10					N/A
600	MMUC PER LINE OR TRUNK					N/A
610	TERMINATION					N/A
620	FACILITY					N/A
630	INSTALLATION PER LN OR TRK	N/A				N/A
640	OTHER TRANSPORT	N/A				N/A
650	TOTAL SERVICE CAT	N/A				N/A
660	SBI	N/A	N/A	N/A	N/A	XX.XX
670	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	XXX.XX
680	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	XX.XX

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
TRAFFIC SENSITIVE BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)
	INFORMATION SERVICE CATEGORY					
700	INFORMATION - PER MSG.					N/A
710	INFO - PREMIUM SURCHARGE					N/A
720	INFO - NON-PREM SURCHARGE					N/A
730	INFORMATION - OTHER	N/A				N/A
740	TOTAL SERVICE CAT	N/A				N/A
750	SBI	N/A	N/A	N/A	N/A	XX.XX
760	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	XXX.XX
770	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	XX.XX
780	TOTAL BASKET	N/A				N/A
790	TOTAL API	N/A	N/A	N/A	N/A	XX.XX
800	TOTAL PCI	N/A	N/A	N/A	N/A	XX.XX

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND		BASE PERIOD DEMAND X 7/1/90 RATES		BASE PERIOD DEMAND X CURRENT RATES	
		FIXED	VARIABLE	FIXED	VARIABLE	FIXED	VARIABLE
		(A)	(B)	(C)	(D)	(E)	(F)
	VOICE GRADE, WATS, METALLIC & TELEGRAPH SERVICE CATEGORY						
	VOICE GRADE & WATS:						
900	CHAN TERM - 2 WIRE		N/A		N/A		N/A
910	CHAN TERM - 4 WIRE		N/A		N/A		N/A
	INTER-OFFICE MILEAGE:						
920	V G & WATS - MB1						
930	V G & WATS - MB2						
940	V G & WATS - MB3						
950	V G & WATS - MB4						
960	V G & WATS - MB5						
970	V G & WATS - MB6						
980	V G & WATS - MB7						
990	V G & WATS - MB8						
1000	V G & WATS - MB9						
1010	V G & WATS - MB10						
1020	OTHER VOICE GRADE	N/A	N/A				
	METALLIC:						
1030	CHAN TERM		N/A		N/A		N/A
1040	INTER-OFFICE MILEAGE						
1050	OTHER	N/A	N/A				
	TELEGRAPH:						
1060	CHAN TERM - 2 WIRE		N/A		N/A		N/A
1070	CHAN TERM - 4 WIRE		N/A		N/A		N/A
1080	INTER-OFFICE MILEAGE						
1090	OTHER	N/A	N/A				
1100	OTHER	N/A	N/A				
1110	TOTAL SERVICE CAT	N/A	N/A				
1120	SBI	N/A	N/A	N/A	N/A	N/A	N/A
1130	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	N/A	N/A
1140	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	N/A	N/A

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND X PROPOSED RATES		INDEX
		FIXED	VARIABLE	RESULTS
		(G)	(H)	(I)
	VOICE GRADE, WATS, METALLIC & TELEGRAPH SERVICE CATEGORY			
	VOICE GRADE & WATS:			
900	CHAN TERM - 2 WIRE		N/A	N/A
910	CHAN TERM - 4 WIRE		N/A	N/A
	INTER-OFFICE MILEAGE:			
920	V G & WATS - MB1			N/A
930	V G & WATS - MB2			N/A
940	V G & WATS - MB3			N/A
950	V G & WATS - MB4			N/A
960	V G & WATS - MB5			N/A
970	V G & WATS - MB6			N/A
980	V G & WATS - MB7			N/A
990	V G & WATS - MB8			N/A
1000	V G & WATS - MB9			N/A
1010	V G & WATS - MB10			N/A
1020	OTHER VOICE GRADE			N/A
	METALLIC:			
1030	CHAN TERM		N/A	N/A
1040	INTER-OFFICE MILEAGE			N/A
1050	OTHER			N/A
	TELEGRAPH:			
1050	CHAN TERM - 2 WIRE		N/A	N/A
1070	CHAN TERM - 4 WIRE		N/A	N/A
1080	INTER-OFFICE MILEAGE			N/A
1090	OTHER			N/A
1100	OTHER			N/A
1110	TOTAL SERVICE CAT			N/A
1120	SBI	N/A	N/A	XX.XX
1130	UPPER SBI LIMIT	N/A	N/A	XXX.XX
1140	LOWER SBI LIMIT	N/A	N/A	XX.XX

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)
	AUDIO & VIDEO SERVICE CATEGORY					
	AUDIO:					
1200	CHAN TERM					N/A
1210	INTER-OFFICE MILEAGE					N/A
1220	OTHER	N/A				N/A
	VIDEO:					
1230	CHAN TERM					N/A
1240	INTER-OFFICE MILEAGE					N/A
1250	OTHER	N/A				N/A
1260	TOTAL SERVICE CAT	N/A				N/A
1270	SBI	N/A	N/A	N/A	N/A	XX.XX
1280	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	XXX.XX
1290	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	XX.XX

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND (A)	BASE PERIOD DEMAND X 7/1/90 RATES (B)	BASE PERIOD DEMAND X CURRENT RATES (C)	BASE PERIOD DEMAND X PROPOSED RATES (D)	INDEX RESULTS (E)
	HIGH CAP & DDS SERVICE CATEGORY					
	DS1 SUB-CAT:					
1400	CHAN TERM					N/A
	INTER-OFFICE MILEAGE:					
1410	DS1 - MB1					N/A
1420	DS1 - MB2					N/A
1430	DS1 - MB3					N/A
1440	DS1 - MB4					N/A
1450	DS1 - MB5					N/A
1460	DS1 - MB6					N/A
1470	DS1 - MB7					N/A
1480	DS1 - MB8					N/A
1490	DS1 - MB9					N/A
1500	DS1 - MB10					N/A
1510	OTHER	N/A				N/A
1520	DS1 SUBINDEX	N/A	N/A	N/A	N/A	XX.XX
1530	UPPER LIMIT	N/A	N/A	N/A	N/A	XXX.XX
1540	LOWER LIMIT	N/A	N/A	N/A	N/A	XX.XX

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)
	HIGH CAP & DDS SERVICE CATEGORY (CONTINUED)					
	DS3 SUB-CAT:					
1600	CHAN TERM					N/A
	INTER-OFFICE MILEAGE:					
1610	DS3 - MB1					N/A
1620	DS3 - MB2					N/A
1630	DS3 - MB3					N/A
1640	DS3 - MB4					N/A
1650	DS3 - MB5					N/A
1660	DS3 - MB6					N/A
1670	DS3 - MB7					N/A
1680	DS3 - MB8					N/A
1690	DS3 - MB9					N/A
1700	DS3 - MB10					N/A
1710	OTHER	N/A				N/A
1720	DS3 SUBINDEX	N/A	N/A	N/A	N/A	XX.XX
1730	UPPER LIMIT	N/A	N/A	N/A	N/A	XXX.XX
1740	LOWER LIMIT	N/A	N/A	N/A	N/A	XX.XX
	DDS:					
1750	CHAN TERM					N/A
1760	INTER-OFFICE MILEAGE					N/A
1770	OTHER	N/A				N/A
1780	TOTAL SERVICE CAT	N/A				N/A
1790	SBI	N/A	N/A	N/A	N/A	XX.XX
1800	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	XXX.XX
1810	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	XX.XX

FILING ENTITY:

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND (A)	BASE PERIOD DEMAND X 7/1/90 RATES (B)	BASE PERIOD DEMAND X CURRENT RATES (C)	BASE PERIOD DEMAND X PROPOSED RATES (D)	INDEX RESULTS (E)
	WIDEBAND SERVICE CATEGORY					
	DATA:					
1900	CHAN TERM					N/A
1910	INTER-OFFICE MILEAGE					N/A
1920	OTHER	N/A				N/A
	ANALOG:					
1930	CHAN TERM					N/A
1940	INTER-OFFICE MILEAGE					N/A
1950	OTHER	N/A				N/A
1960	OTHER WIDEBAND	N/A				N/A
1970	TOTAL SERVICE CAT	N/A				N/A
1980	SBI	N/A	N/A	N/A	N/A	XX.XX
1990	UPPER SBI LIMIT	N/A	N/A	N/A	N/A	XXX.XX
2000	LOWER SBI LIMIT	N/A	N/A	N/A	N/A	XX.XX
2010	TOTAL BASKET	N/A				N/A
2020	TOTAL API	N/A	N/A	N/A	N/A	XX.XX
2030	TOTAL PCI	N/A	N/A	N/A	N/A	XX.XX

FILING ENTITY:

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
INTEREXCHANGE BASKET
(REVENUES AND MINUTES IN THOUSANDS)

		BASE PERIOD DEMAND	BASE PERIOD DEMAND X 7/1/90 RATES	BASE PERIOD DEMAND X CURRENT RATES	BASE PERIOD DEMAND X PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)
	INTEREXCHANGE					
2100	TOTAL BASKET	N/A				N/A
2110	TOTAL API	N/A	N/A	N/A	N/A	XX.XX
2120	TOTAL PCI	N/A	N/A	N/A	N/A	XX.XX

FILING ENTITY:

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
COMMON LINE BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	END USER COMMON LINE				
100	MULTILINE BUSINESS EUCL*				
110	RES & SINGLE LINE BUS EUCL*				
120	LIFELINE*				
130	SPECIAL ACCESS SURCHARGE				
	CARRIER COMMON LINE				
140	TERMINATING CCL PREM				
150	TERMINATING CCL NON-PREM				
160	ORIGINATING CCL PREM				
170	ORIGINATING CCL NON-PREM				
180	TOTAL BASKET	N/A	N/A	N/A	

* MAY BE COMPOSITE RATE.

FILING ENTITY:

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
TRAFFIC SENSITIVE BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	LOCAL SWITCHING SERVICE CATEGORY				
200	PREMIUM SWITCHING LS1				
210	PREMIUM SWITCHING LS2				
220	NON-PREM SWITCHING				
230	EQUAL ACCESS				
240	OTHER SWITCHING	N/A	N/A	N/A	
250	TOTAL SERVICE CAT	N/A	N/A	N/A	
260	SBI	N/A	N/A	N/A	N/A
270	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
280	LOWER SBI LIMIT	N/A	N/A	N/A	N/A
	LOCAL TRANSPORT SERVICE CATEGORY				
	PREMIUM LOCAL TRANSPORT:				
290	LOCAL TRANS - MB1				
300	LOCAL TRANS - MB2				
310	LOCAL TRANS - MB3				
320	LOCAL TRANS - MB4				
330	LOCAL TRANS - MB5				
340	LOCAL TRANS - MB6				
350	LOCAL TRANS - MB7				
360	LOCAL TRANS - MB8				
370	LOCAL TRANS - MB9				
380	LOCAL TRANS - MB10				
390	MMUC PER LINE OR TRUNK				
400	TERMINATION				
410	FACILITY				

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
TRAFFIC SENSITIVE BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	LOCAL TRANSPORT SERVICE CATEGORY (CONTINUED)				
	NON-PREM LOCAL TRANSPORT:				
500	LOCAL TRANS - MB1				
510	LOCAL TRANS - MB2				
520	LOCAL TRANS - MB3				
530	LOCAL TRANS - MB4				
540	LOCAL TRANS - MB5				
550	LOCAL TRANS - MB6				
560	LOCAL TRANS - MB7				
570	LOCAL TRANS - MB8				
580	LOCAL TRANS - MB9				
590	LOCAL TRANS - MB10				
600	MMUC PER LINE OR TRUNK				
610	TERMINATION				
620	FACILITY				
630	INSTALLATION PER LN OR TRK	N/A	N/A	N/A	
640	OTHER TRANSPORT	N/A	N/A	N/A	
650	TOTAL SERVICE CAT	N/A	N/A	N/A	
660	SBI	N/A	N/A	N/A	N/A
670	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
680	LOWER SBI LIMIT	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
TRAFFIC SENSITIVE BASKET
(REVENUES IN THOUSANDS)

	INFORMATION SERVICE CATEGORY	7/1/90 RATES (A)	CURRENT RATES (B)	PROPOSED RATES (C)	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES (D)
700	INFORMATION - PER MSG.				
710	INFO - PREMIUM SURCHARGE				
720	INFO - NON-PREM SURCHARGE				
730	INFORMATION - OTHER	N/A	N/A	N/A	
740	TOTAL SERVICE CAT	N/A	N/A	N/A	
750	SBI	N/A	N/A	N/A	N/A
760	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
770	LOWER SBI LIMIT	N/A	N/A	N/A	N/A
780	TOTAL BASKET	N/A	N/A	N/A	
790	TOTAL API	N/A	N/A	N/A	N/A
800	TOTAL PCI	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES		CURRENT RATES	
		FIXED	VARIABLE	FIXED	VARIABLE
		(A)	(B)	(C)	(D)
	VOICE GRADE, WATS, METALLIC & TELEGRAPH SERVICE CATEGORY				
	VOICE GRADE & WATS:				
900	CHAN TERM - 2 WIRE		N/A		N/A
910	CHAN TERM - 4 WIRE		N/A		N/A
	INTER-OFFICE MILEAGE:				
920	V G & WATS - MB1				
930	V G & WATS - MB2				
940	V G & WATS - MB3				
950	V G & WATS - MB4				
960	V G & WATS - MB5				
970	V G & WATS - MB6				
980	V G & WATS - MB7				
990	V G & WATS - MB8				
1000	V G & WATS - MB9				
1010	V G & WATS - MB10				
1020	OTHER VOICE GRADE	N/A	N/A	N/A	N/A
	METALLIC:				
1030	CHAN TERM		N/A		N/A
1040	INTER-OFFICE MILEAGE	N/A	N/A	N/A	N/A
1050	OTHER	N/A	N/A	N/A	N/A
	TELEGRAPH:				
1060	CHAN TERM - 2 WIRE		N/A		N/A
1070	CHAN TERM - 4 WIRE		N/A		N/A
1080	INTER-OFFICE MILEAGE	N/A	N/A	N/A	N/A
1090	OTHER	N/A	N/A	N/A	N/A
1100	OTHER	N/A	N/A	N/A	N/A
1110	TOTAL SERVICE CAT	N/A	N/A	N/A	N/A
1120	SBI	N/A	N/A	N/A	N/A
1130	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
1140	LOWER SBI LIMIT	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES IN THOUSANDS)

		PROPOSED RATES		BASE PERIOD DEMAND X PROPOSED RATES MINUS BASE PERIOD DEMAND X CURRENT RATES	
		FIXED	VARIABLE	FIXED	VARIABLE
		(E)	(F)	(G)	(H)
	VOICE GRADE, WATS, METALLIC & TELEGRAPH SERVICE CATEGORY				
	VOICE GRADE & WATS:				
900	CHAN TERM - 2 WIRE		N/A		N/A
910	CHAN TERM - 4 WIRE		N/A		N/A
	INTER-OFFICE MILEAGE:				
920	V G & WATS - MB1				
930	V G & WATS - MB2				
940	V G & WATS - MB3				
950	V G & WATS - MB4				
960	V G & WATS - MB5				
970	V G & WATS - MB6				
980	V G & WATS - MB7				
990	V G & WATS - MB8				
1000	V G & WATS - MB9				
1010	V G & WATS - MB10				
1020	OTHER VOICE GRADE	N/A	N/A		
	METALLIC:				
1030	CHAN TERM		N/A		N/A
1040	INTER-OFFICE MILEAGE	N/A	N/A		
1050	OTHER	N/A	N/A		
	TELEGRAPH:				
1060	CHAN TERM - 2 WIRE		N/A		N/A
1070	CHAN TERM - 4 WIRE		N/A		N/A
1080	INTER-OFFICE MILEAGE	N/A	N/A		
1090	OTHER	N/A	N/A		
1100	OTHER	N/A	N/A		
1110	TOTAL SERVICE CAT	N/A	N/A		
1120	SBI	N/A	N/A	N/A	N/A
1130	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
1140	LOWER SBI LIMIT	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	AUDIO & VIDEO SERVICE CATEGORY				
	AUDIO:				
1200	CHAN TERM	N/A	N/A	N/A	
1210	INTER-OFFICE MILEAGE	N/A	N/A	N/A	
1220	OTHER	N/A	N/A	N/A	
	VIDEO:				
1230	CHAN TERM	N/A	N/A	N/A	
1240	INTER-OFFICE MILEAGE	N/A	N/A	N/A	
1250	OTHER	N/A	N/A	N/A	
1260	TOTAL SERVICE CAT	N/A	N/A	N/A	
1270	SBI	N/A	N/A	N/A	N/A
1280	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
1290	LOWER SBI LIMIT	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	HIGH CAP & DDS SERVICE CATEGORY				
	DS1 SUB-CAT:				
1400	CHAN TERM				
	INTER-OFFICE MILEAGE:				
1410	DS1 - MB1				
1420	DS1 - MB2				
1430	DS1 - MB3				
1440	DS1 - MB4				
1450	DS1 - MB5				
1460	DS1 - MB6				
1470	DS1 - MB7				
1480	DS1 - MB8				
1490	DS1 - MB9				
1500	DS1 - MB10				
1510	OTHER	N/A	N/A	N/A	
1520	DS1 SUBINDEX	N/A	N/A	N/A	N/A
1530	UPPER LIMIT	N/A	N/A	N/A	N/A
1540	LOWER LIMIT	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	HIGH CAP & DDS SERVICE CATEGORY (CONTINUED)				
	DS3 SUB-CAT:				
1600	CHAN TERM				
	INTER-OFFICE MILEAGE:				
1610	DS3 - MB1				
1620	DS3 - MB2				
1630	DS3 - MB3				
1640	DS3 - MB4				
1650	DS3 - MB5				
1660	DS3 - MB6				
1670	DS3 - MB7				
1680	DS3 - MB8				
1690	DS3 - MB9				
1700	DS3 - MB10				
1710	OTHER	N/A	N/A	N/A	
1720	DS3 SUBINDEX	N/A	N/A	N/A	N/A
1730	UPPER LIMIT	N/A	N/A	N/A	N/A
1740	LOWER LIMIT	N/A	N/A	N/A	N/A
	DDS:				
1750	CHAN TERM				
1760	INTER-OFFICE MILEAGE				
1770	OTHER	N/A	N/A	N/A	
1780	TOTAL SERVICE CAT	N/A	N/A	N/A	
1790	SBI	N/A	N/A	N/A	N/A
1800	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
1810	LOWER SBI LIMIT	N/A	N/A	N/A	N/A

FILING ENTITY:

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
SPECIAL ACCESS BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
	WIDEBAND SERVICE CATEGORY				
	DATA:				
1900	CHAN TERM	N/A	N/A	N/A	
1910	INTER-OFFICE MILEAGE	N/A	N/A	N/A	
1920	OTHER	N/A	N/A	N/A	
	ANALOG:				
1930	CHAN TERM	N/A	N/A	N/A	
1940	INTER-OFFICE MILEAGE	N/A	N/A	N/A	
1950	OTHER	N/A	N/A	N/A	
1960	OTHER WIDEBAND	N/A	N/A	N/A	
1970	TOTAL SERVICE CAT	N/A	N/A	N/A	
1980	SBI	N/A	N/A	N/A	N/A
1990	UPPER SBI LIMIT	N/A	N/A	N/A	N/A
2000	LOWER SBI LIMIT	N/A	N/A	N/A	N/A
2010	TOTAL BASKET	N/A	N/A	N/A	
2020	TOTAL API	N/A	N/A	N/A	N/A
2030	TOTAL PCI	N/A	N/A	N/A	N/A

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1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
INTEREXCHANGE BASKET
(REVENUES IN THOUSANDS)

		7/1/90 RATES	CURRENT RATES	PROPOSED RATES	BASE PER DEM X PROP RATES MINUS BASE PER DEM X CUR RATES
		(A)	(B)	(C)	(D)
INTEREXCHANGE					
2100	TOTAL BASKET	N/A	N/A	N/A	
2110	TOTAL API	N/A	N/A	N/A	N/A
2120	TOTAL PCI	N/A	N/A	N/A	N/A

FILING ENTITY:

EXG-1
Page 1 of 1

1991 TRANSITION FILING
PRICE CAP TARIFF REVIEW PLAN
EFFECT OF EXOGENOUS CHANGES
($000)

	SERVICE BASKET	DISALLOWANCE ADJUSTMENT (A)	ROR REPRESCRIPTION (B)	LTS/TRS (C)	OTHER (D)	COMBINED EFFECT (E)
	COMMON LINE:					
100	AVERAGE NET INVESTMENT	N/A		N/A		N/A
110	TAX EFFECT	N/A		N/A		N/A
120	REVENUE EFFECT					N/A
130	BASE REVENUE *					N/A
140	DELTA Z / R **					
	TRAFFIC SENSITIVE:					
150	AVERAGE NET INVESTMENT	N/A		N/A		N/A
160	TAX EFFECT	N/A		N/A		N/A
170	REVENUE EFFECT			N/A		N/A
180	BASE REVENUE *			N/A		N/A
190	DELTA Z / R **			N/A		
	SPECIAL ACCESS:					
200	AVERAGE NET INVESTMENT	N/A		N/A		N/A
210	TAX EFFECT	N/A		N/A		N/A
220	REVENUE EFFECT			N/A		N/A
230	BASE REVENUE *			N/A		N/A
240	DELTA Z / R **			N/A		
	INTEREXCHANGE:					
250	AVERAGE NET INVESTMENT	N/A	N/A	N/A		N/A
260	TAX EFFECT	N/A	N/A	N/A		N/A
270	REVENUE EFFECT	N/A	N/A	N/A		N/A
280	BASE REVENUE	N/A	N/A	N/A		N/A
290	DELTA Z / R	N/A	N/A	N/A		

* BASE REVENUE FOR COLUMN A EQUALS 7/1/90 REVENUE REQUIREMENT.

** DELTA Z / R = REVENUE EFFECT DIVIDED BY BASE REVENUE, I.E., ROW 120 / ROW 130, ROW 170 / ROW 180, ETC.
FOR COLUMN E ONLY, DELTA Z / R = ((1 + ROW 140A) X (1 + ROW 140B + ROW 140C) - 1), ETC.

Attachment B

RATE OF RETURN

TARIFF REVIEW PLAN

Approved by OMB
3060-0460
Expires 01/22/91
See below for information regarding public burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their January 1, 1991 access charge tariff filings in partial fulfillment of Section 61.38 and Section 61.41 through 61.49 of the Commission's Rules. The TRPs specify basic cost and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to determine whether the services offered are just and reasonable as required by the Communications Act of 1934, as amended. Your response is mandatory.

Public reporting burden for this collection of information is estimated to average 50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

TARIFF REVIEW PLAN DATA GUIDELINES

1. ALL AMOUNTS ARE TO BE IN WHOLE NUMBERS EXCEPT AS SPECIFIED ON A PARTICULAR TABLE.

2. ALL PERCENTAGES ARE TO BE CARRIED OUT TO 2 DECIMAL PLACES EXCEPT WHERE NOTED ON A PARTICULAR TABLE. EXAMPLE; 29 2/3 PERCENT SHOULD BE SHOWN AS 29.67

3. ALL RATIOS ARE TO BE CARRIED OUT TO 4 DECIMAL PLACES EXCEPT WHERE NOTED ON A PARTICULAR TABLE.

4. ALL FOOTNOTES, ADDITIONAL TO THOSE PREPRINTED ON FORMS, SHOULD BE PUT ON A SEPARATE FOOTNOTED PAGE AND INSERTED FOLLOWING THE FORM THEY REFERENCE. THE FOOTNOTE PAGE SHOULD INCLUDE THE COMPANY, STUDY AREA AND FORM TO WHICH THEY PERTAIN.

RULES FOR SUBMISSION OF DATA TO FCC ON MAGNETIC MEDIA

(FOR PRICE CAP AND TIER 1 NON-PRICE CAP COMPANIES ONLY)

1. ALL DATA SHOULD BE SUBMITTED ON 5.25 INCH PC FLOPPY DISKS DOUBLE SIDED DOUBLE DENSITY.

2. ALL FILES SHOULD BE CODED IN ASCII.

3. ALL FILES FOR A FILING ENTITY, I.E. STUDY AREA, OPERATING COMPANY, OR HOLDING COMPANY, SHOULD BE CONTAINED ON A SEPARATE DISK(S).

4. A SEPARATE FILE SHOULD BE PREPARED FOR EACH SEPARATE TABLE OF DATA, E.G., EXG-1, SUM-1, T1WS-1, ETC. THE FILE NAME, FOR EACH TABLE, IS A COMBINATION OF COSA (CO = COMPANY, SA = STUDY AREA, E.G., THE COSA FOR PACIFIC BELL OF CALIFORNIA IS PTCA) PLUS THE TABLE NAME. THE TABLE NAME IS THE TABLE NAME WITHOUT THE HYPHEN, E.G. THE TABLE NAME FOR EXG-1 IS EXG1. THE TABLE NAMES FOR THE RATE OF RETURN CARRIERS EXCLUDE 'T1' OR 'T2', E.G. THE TABLE NAME FOR T1WS-1 IS WS1.

   FOR EXAMPLE, THE FILE NAME FOR TABLE EXG-1 FOR PACIFIC BELL-CALIFORNIA SHOULD BE PTCAEXG1.

5. EACH DATA FILE SHOULD CONTAIN ONLY TABLE ROW NUMBERS AND THE APPROPRIATE NUMBER OF DATA ITEMS PER ROW. DATA MUST BE DELIMITED BY EITHER A COMMA OR SPACE, E.G.:

```
FILENAME PTCAEXG1 [FILE FOR PACIFIC BELL, TABLE SUM-1]
100,12345,12356,12367
110,10010,10021,10032

ETC.

- OR -

100 12345 12356 12367
110 10010 10021 10032

ETC.
```

6. ANY DATA ITEM FOR WHICH NO VALID DATA EXISTS FOR A PARTICULAR FILING ENTITY SHOULD BE POPULATED WITH -99999. IF THE DATA ITEM IS A TRUE ZERO, THEN A 0 (ZERO) SHOULD BE ENTERED.

7. ANY NON-NUMERIC DATA MUST BE ENCLOSED IN QUOTATION MARKS. E.G. DATE FIELD IN EXHIBIT T1WS-3 MUST BE SHOWN AS "07/16/90".

STUDY AREA: _____ T1WS-1

RATE ADJUSTMENT ANALYSIS SUMMARY

	RATE CATEGORIES	CURRENT RATES	RATE ADJUSTMENT FACTOR*	RATES EFFECTIVE 1/1/91
		(A)	(B)	(C)=A*B
	END USER**			
100	MULTI-LINE BUSINESS	_____	_____	_____
110	RES. & SNG. LN. BUS.	_____	N/A	_____
	TRAFFIC SENSITIVE			
	SWITCHING			
120	LS2	_____	_____	_____
130	LS1	_____	_____	_____
140	NON PREMIUM	_____	_____	_____
	LT TERMINATION			
150	PREMIUM	_____	_____	_____
160	NON-PREMIUM	_____	_____	_____
	LT FACILITY			
170	PREMIUM	_____	_____	_____
180	NON-PREMIUM	_____	_____	_____
190	TOTAL TRANSPORT***	N/A	_____	N/A
	INFORMATION			
200	PREMIUM	_____	_____	_____
210	NON-PREMIUM	_____	_____	_____
220	SPECIAL ACCESS****	N/A	_____	N/A

* SOURCE IS T1WS-2

** ROW 100 COLUMN A SHOULD REFLECT THE BFP REVENUE REQUIREMENT @ 12% / TEST PERIOD ACCESS LINES / 12. IF THE RESULT LISTED ON ROW 100 COLUMN C, IS LESS THAN $3.50, SINGLE LINE BUSINESS AND RESIDENTIAL RATES IN ROW 110 COLUMN C MUST BE FILED AT THAT LEVEL. IF THE RESULT ON ROW 100 COLUMN C IS GREATER THAN $6.00, THE MULTI-LINE END USER RATE IS CAPPED AT $6.00 AND THE SINGLE LINE RATE IS CAPPED AT $3.50.

*** TRANSPORT RATES FOR SOME COMPANIES ARE DEVELOPED ON MILEAGE BANDS RATHER THAN BROKEN INTO FACILITY AND TERMINATION CHARGES. IN THESE INSTANCES, ROWS 150 THRU 180 ARE NOT APPLICABLE AND THE RAF CONTAINED ON ROW 190 COLUMN B IS APPLICABLE TO ALL TRAFFIC SENSITIVE TRANSPORT RATES FILED.

**** THE RAF FACTOR FOR SPECIAL ACCESS IS APPLICABLE TO COMPANY SPECIFIC SPECIAL ACCESS RATES.

STUDY AREA: _____ T1WS-2

COST ANAYSIS SUMMARY

	COST CATEGORIES	REV REQ UNDERLYING CURRENT RATES* (A)	NONRECURRING AND ICB REVENUE IN COLUMN A*** (B)	RECURRING REVENUE REQUIREMENT (C)=A-B	EXOGENOUS COST CHANGES** (D)	RECURRING REV REQ ADJ FOR EXOGENOUS COST CHANGES (E)=C+D	RATE ADJUSTMENT FACTOR (F)=E/C
100	COMMON LINE						N/A
110	BFP						
120	ISW						N/A
130	PAY						N/A
140	SWITCHED TRAFFIC SENSITIVE						N/A
150	SWITCHING						
160	TRANSPORT						
170	INFORMATION						
180	SPECIAL ACCESS						
190	TOTAL ACCESS						N/A

* SOURCE IS T1WS-3 COLUMN D
** SOURCE IS T1WS-4 COLUMN D
*** REQUIRED FOR THOSE COMPANIES THAT ARE NOT APPLYING RAF FACTORS TO NON-RECURRING AND ICB RATES. COMPANIES APPLYING RAF FACTORS TO ALL RATES, INCLUDING NRC'S AND ICB'S, SHOULD COMPLETE COLUMN B WITH ZEROS.

STUDY AREA: _____ T1WS-3

DEVELOPMENT OF REVENUE REQUIREMENT UNDERLYING CURRENT RATES

	COST CATEGORIES	REV. REQ. UNDERLYING RATES IN EFFECT ON 7/1/90 (A)	DISALLOWANCE ADJUSTMENTS* (B)	EC SPECIFIC ADJUSTMENTS BY TRANSMIT.** (C)	REV. REQ. UNDERLYING CURRENT RATES*** (D)=A+B+C
100	COMMON LINE	_____	_____	_____	_____
110	BFP	_____	_____	_____	_____
120	ISW	_____	_____	_____	_____
130	PAY	_____	_____	_____	_____
140	SWITCHED TRAFFIC SENSITIVE	_____	_____	_____	_____
150	SWITCHING	_____	_____	_____	_____
160	TRANSPORT	_____	_____	_____	_____
170	INFORMATION	_____	_____	_____	_____
180	SPECIAL ACCESS	_____	_____	_____	_____
190	TOTAL ACCESS	_____	_____	_____	_____
200	TRANSMITTAL NUMBER****	N/A	N/A	_____	N/A
210	TRANSMITTAL DATE*****	N/A	N/A	_____	N/A

* REFLECT DISALLOWANCES MADE IN 7/2/90 AND 10/3/90 ORDERS
** IDENTIFY TRANSMITTAL ASSOCIATED WITH THIS VIEW
*** MUST AGREE WITH T1WS-2, COL A.
**** THE TRANSMITTAL NUMBER FOR COL B AND C SHOULD BE ENTERED ON ROW 200. ENTER NONE IF NO TRANSMITTALS WERE SUBMITTED.
***** THE TRANSMITTAL DATE FOR COL B AND C SHOULD BE ENTERED ON ROW 210. ENTER NONE IF NO TRANSMITTALS WERE SUBMITTED.

STUDY AREA: _____ T1WS-4

ROR REPRESCRIPTION
EXOGENOUS COST CHANGES

	COST CATEGORIES	RATEBASE AS ADJUST. FOR DISALLOW. (A)	ROR EFFECTS (B)=A*-.0075	TAX EFFECTS (C)SEE NOTE	TOTAL EXOGENOUS CHANGES (D)=B+C	TOTAL REV. REQ. AS ADJ. FOR DISALLOW. (E)
100	COMMON LINE					
110	BFP					
120	ISW					
130	PAY					
140	SWITCHED TRAFFIC SENSITIVE					
150	SWITCHING					
160	TRANSPORT					
170	INFORMATION					
180	SPECIAL ACCESS					
190	TOTAL ACCESS					

NOTE: COLUMN A IS THE RATEBASE UNDERLYING CURRENTLY EFFECTIVE RATES AS ADJUSTED FOR DISALLOWANCES (I.E. SPECIFIED IN 7/2/90 AND 10/3/90 FCC ORDERS)

COLUMN C REPRESENTS THE TAX EFFECTS OF THE DECREASE IN RETURN ASSOCIATED WITH COLUMN B. THE SPECIFIC TAX CONSEQUENCES WILL BE COMPANY SPECIFIC BASED ON APPLICABLE FEDERAL AND STATE TAX GROSS UP RATES.

COLUMN D IS THE TOTAL EFFECT OF THE ROR REPRESCRIPTION AND WILL BE USED TO DEVELOP THE RAF ON T1WS-2. T1WS-4 COLUMN D SHOULD EQUAL T1WS-2 COLUMN D.

COLUMN E IS THE REVENUE REQUIREMENTS UNDERLYING CURRENT RATES INCLUSIVE OF ANY DISALLOWANCES, BOTH RATEBASE (CONTAINED IN COLUMN A) AND EXPENSE ITEMS.

STUDY AREA: _____ TIWS-5

ANNUALIZED ACCESS
PRICE OUT COMPARISONS

		REVENUES AT CURRENT RATES (A)	REVENUES AT PROPOSED RATES (B)	CHANGE (C)=B-A
100	TOTAL MULTI-LINE BUSINESS (INCL. SPEC. ACC. SURCHARGE REV.) *			
110	TOTAL RESIDENCE AND SINGLE-LINE BUSINESS			
120	TOTAL CCL*			
130	TOTAL TS SWITCHED (EXCL. DA)			
140	TOTAL SPECIAL ACCESS			
150	DIRECTORY ASSISTANCE			

NOTE: REVENUES ARE CALCULATED USING DEMAND UNDERLYING CURRENT RATES. THE DEMAND USED TO CALCULATE THE REVENUES IN COL'S A AND B SHOULD BE IDENTICAL.

COMPANIES THAT PARTICIPATE IN THE NECA EU POOL ARE NOT REQUIRED TO POPULATE ROW 100 AND ROW 110.

POPULATED ONLY BY CARRIERS FILING THEIR OWN CCL RATES (NON-NECA POOLED)

STUDY AREA: _____ T1WS-6

CARRIER COMMON LINE RATE DEVELOPMENT

		DATA UNDERLYING CURRENT RATES (A)	DATA UNDERLYING PROPOSED RATES (B)	CHANGE (C)=B-A
100	TOTAL COMMON LINE REV. REQ.			
110	LTS + TRS			
120	END USER REVENUE (NOTE 1)			
130	SPECIAL ACCESS SURCHARGE REVENUE			
140	REV. REQ. FOR CARRIER COMMOM LINE (NOTE 2)			
150	ORIGINATING CCL RATEMAKING MOU (NOTE 3)			
160	REVENUE FROM ORIGINATING CCL (NOTE 4)			
170	REV. REQ. FOR TERMINATING CCL (NOTE 5)			
180	TERMINATING CCL RATEMAKING MOU (NOTE 3)			
190	PREMIUM TERMINATING CCL RATE (NOTE 6)			
200	NON PREMIUM TERMINATING CCL RATE (NOTE 7)			
210	TOTAL RATEMAKING MOU (NOTE 8)			
220	PREMIUM ORIG. AND TERM. CCL RATE (NOTE 9)			
230	NON-PREMIUM ORIG. AND TERM. CCL RATE (NOTE 10)			

NOTE 1 -- SOURCE IS T1WS-5, ROW 100 + ROW 110
NOTE 2 -- ROW 140 = ROW 100 + ROW 110 - ROW 120 - ROW 130
NOTE 3 -- RATEMAKING MOU = PREMIUM MOU + (.45 * NON PREMIUM MOU)
NOTE 4 -- ROW 160 = ROW 150 * 0.01
NOTE 5 -- ROW 170 = ROW 140 - ROW 160
NOTE 6 -- ROW 190 = ROW 170 / ROW 180
NOTE 7 -- ROW 200 = ROW 190 * .45
NOTE 8 -- ROW 210 = ROW 150 + ROW 180
NOTE 9 -- ROW 220 = ROW 140 / ROW 210
NOTE 10-- ROW 230 = ROW 220 * .45

STUDY AREA: _____ T2WS-1

RATE ADJUSTMENT ANALYSIS SUMMARY

	RATE CATEGORIES	CURRENT RATES	RATE ADJUSTMENT FACTOR*	RATES EFFECTIVE 1/1/91
		(A)	(B)	(C)=A*B
	END USER**			
100	MULTI-LINE BUSINESS	_____	_____	_____
110	RES. & SNG. LN. BUS.	_____	N/A	_____
	TRAFFIC SENSITIVE			
	SWITCHING			
120	LS2	_____	_____	_____
130	LS1	_____	_____	_____
140	NON PREMIUM	_____	_____	_____
	LT TERMINATION			
150	PREMIUM	_____	_____	_____
160	NON-PREMIUM	_____	_____	_____
	LT FACILITY			
170	PREMIUM	_____	_____	_____
180	NON-PREMIUM	_____	_____	_____
190	TOTAL TRANSPORT***	N/A	_____	N/A
	INFORMATION			
200	PREMIUM	_____	_____	_____
210	NON-PREMIUM	_____	_____	_____
220	SPECIAL ACCESS****	N/A	_____	N/A

* SOURCE IS T2WS-2

** ROW 100 COLUMN A SHOULD REFLECT THE BFP REVENUE REQUIREMENT @ 12% / TEST PERIOD ACCESS LINES / 12. IF THE RESULT LISTED ON ROW 100 COLUMN C, IS LESS THAN $3.50, SINGLE LINE BUSINESS AND RESIDENTIAL RATES IN ROW 110 COLUMN C MUST BE FILED AT THAT LEVEL. IF THE RESULT ON ROW 100 COLUMN C IS GREATER THAN $6.00, THE MULTI-LINE END USER RATE IS CAPPED AT $6.00 AND THE SINGLE LINE RATE IS CAPPED AT $3.50.

*** TRANSPORT RATES FOR SOME COMPANIES ARE DEVELOPED ON MILEAGE BANDS RATHER THAN BROKEN INTO FACILITY AND TERMINATION CHARGES. IN THESE INSTANCES, ROWS 150 THRU 180 ARE NOT APPLICABLE AND THE RAF CONTAINED ON ROW 190 COLUMN B IS APPLICABLE TO ALL TRAFFIC SENSITIVE TRANSPORT RATES FILED.

**** THE RAF FACTOR FOR SPECIAL ACCESS IS APPLICABLE TO COMPANY SPECIFIC SPECIAL ACCESS RATES.

STUDY AREA: _____ T2WS-2

COST ANAYSIS SUMMARY

	COST CATEGORIES	REV REQ UNDERLYING CURRENT RATES*	NONRECURRING AND ICB REVENUE IN COLUMN A***	RECURRING REVENUE REQUIREMENT	EXOGENOUS COST CHANGES**	RECURRING REV REQ ADJ FOR EXOGENOUS COST CHANGES	RATE ADJUSTMENT FACTOR
		(A)	(B)	(C)=A-B	(D)	(E)=C+D	(F)=E/C
100	COMMON LINE						N/A
110	BFP						
120	ISW						N/A
130	PAY						N/A
140	SWITCHED TRAFFIC SENSITIVE						N/A
150	SWITCHING						
160	TRANSPORT						
170	INFORMATION						
180	SPECIAL ACCESS						
190	TOTAL ACCESS						N/A

* SOURCE IS T2WS-3 COLUMN D
** SOURCE IS T2WS-4 COLUMN C
*** REQUIRED FOR THOSE COMPANIES THAT ARE NOT APPLYING RAF FACTORS TO NON-RECURRING AND ICB RATES. COMPANIES APPLYING RAF FACTORS TO ALL RATES, INCLUDING NRC'S AND ICB'S, SHOULD COMPLETE COLUMN B WITH ZEROS.

STUDY AREA: _____ T2WS-3

DEVELOPMENT OF REVENUE REQUIREMENT UNDERLYING CURRENT RATES

	COST CATEGORIES	REV. REQ. UNDERLYING RATES IN EFFECT ON 7/1/90 (A)	EC SPECIFIC ADJUSTMENTS BY TRANSMIT.* (B)	EC SPECIFIC ADJUSTMENTS BY TRANSMIT.* (C)	REV. REQ. UNDERLYING CURRENT RATES** (D)=A+B+C
100	COMMON LINE				
110	BFP				
120	ISW				
130	PAY				
140	SWITCHED TRAFFIC SENSITIVE				
150	SWITCHING				
160	TRANSPORT				
170	INFORMATION				
180	SPECIAL ACCESS				
190	TOTAL ACCESS				
200	TRANSMITTAL NUMBER***	N/A			N/A
210	TRANSMITTAL DATE****	N/A			N/A

* IDENTIFY TRANSMITTAL ASSOCIATED WITH THIS VIEW
** MUST AGREE WITH T2WS-2, COL A.
*** THE TRANSMITTAL NUMBER FOR COL B AND C SHOULD BE ENTERED ON ROW 200. ENTER NONE IF NO TRANSMITTALS WERE SUBMITTED.
**** THE TRANSMITTAL DATE FOR COL B AND C SHOULD BE ENTERED ON ROW 210. ENTER NONE IF NO TRANSMITTALS WERE SUBMITTED.

STUDY AREA: _____

T2WS-4

	COST CATEGORIES	REV. REQ. UNDERLYING CURRENT RATES	EXOGENOUS COST CHANGES: REV. REQ. IN (A) RESTATED WITH 11.25% ROR	EXOGENOUS COST CHANGES: EXOGENOUS COST CHANGES
		(A)	(B)	(C)=B-A
100	COMMON LINE			
110	BFP			
120	ISW			
130	PAY			
140	SWITCHED TRAFFIC SENSITIVE			
150	SWITCHING			
160	TRANSPORT			
170	INFORMATION			
180	SPECIAL ACCESS			
190	TOTAL ACCESS			

STUDY AREA: _____ T2WS-5

ANNUALIZED ACCESS
PRICE OUT COMPARISONS

		REVENUES AT CURRENT RATES (A)	REVENUES AT PROPOSED RATES (B)	CHANGE (C)=B-A
100	TOTAL MULTI-LINE BUSINESS (INCL. SPEC. ACC. SURCHARGE REV.)			
110	TOTAL RESIDENCE AND SINGLE-LINE BUSINESS			
120	TOTAL CCL	N/A	N/A	N/A
130	TOTAL TS SWITCHED (EXCL. DA)			
140	TOTAL SPECIAL ACCESS			
150	DIRECTORY ASSISTANCE			

NOTE: REVENUES ARE CALCULATED USING DEMAND UNDERLYING CURRENT RATES. THE DEMAND USED TO CALCULATE THE REVENUES IN COL'S A AND B SHOULD BE IDENTICAL.

COMPANIES THAT PARTICPATE IN THE NECA FU POOL ARE NOT REQUIRED TO POPULATE ROW 100 AND 110.

STUDY AREA: _____ T2WS-ML

MULTI-LINE END USER RATE
FLOW THROUGH OF ROR REPRESCRIPTION

100	BFP REVENUE REQUIREMENT UNDERLYING CURRENT RATES	_____
110	BFP REVENUE REQUIREMENT IN ROW 100 RECAST AT 11.25% ROR	_____
120	END USER RATE ADJUSTMENT FACTOR (ROW 110/ROW 100)	_____
130	CURRENT MULTI-LINE BUSINESS END USER RATE	_____
140	1/1/91 MULTI-LINE BUSINESS END USER RATE (ROW 120 * ROW 130) SEE NOTE	_____

NOTE: IF THE RESULT LISTED ON ROW 140 IS LESS THAN $3.50, SINGLE LINE BUSINESS AND RESIDENTIAL RATES MUST BE FILED AT THAT LEVEL. IF THE RESULTS ON ROW 140 ARE GREATER THAN $6.00, THE MULTI-LINE END USER RATE IS CAPPED AT $6.00 AND THE SINGLE LINE RATE IS CAPPED AT $3.50.

Attachment C

FILING INSTRUCTIONS

Attachment C

PROCEDURES FOR JANUARY 1, 1991 ACCESS TARIFF REVISIONS
TO BE FILED ON NOVEMBER 1, 1990

Local exchange carriers (LECs) are required to file new access charge tariffs on November 1, 1990. These new tariffs reflect the represcription of the interstate access rate of return to 11.25 percent and initialize price cap filings for certain LECs. In this Attachment, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

General

Interested parties are reminded that these filings and the associated review and analysis are not part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should not bear any docket number but must instead bear the designation "**JANUARY 1, 1991 ACCESS TARIFF REVISIONS.**" All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, International Transcription Service, Inc., (ITS), Room 246, 1919 M Street, N.W.

Tariff Filings

LECs submitting tariff filings should consult the attached chart which details the number of copies required and the location to which those copies should be delivered. Carriers are especially reminded that (1) the tariff filing must be accompanied with the appropriate filing fee of $490, and (2) they must serve a copy on ITS. Those annual access filings submitted on November 1, 1990 must be delivered to ITS at the Commission in Room 535, 1919 M Street, N.W.

Carriers, whether filing their own individual tariffs or not, are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. § 61.58(a)(4), concerning rate increases in particular. Carriers are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

In an effort to facilitate identification and cataloging of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should not be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted with these revisions and associate the list with the cost volumes and the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, VOLS. 1, 2, 3, 4, BOX 1 OF 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, JANUARY 1, 1991 ACCESS TARIFF REVISIONS, VOL. 2-2 OF 2, NOV. 1, 1990.

5. Each carrier should submit its respective Tariff Review Plan and Certification in a separately bound package as required by this Order.

6. In addition to the paper copies, each price cap company and each non-price cap Tier 1 company must submit three copies of its Tariff Review Plan information on computer "floppy disks". Carriers should follow the rules for submission of data to FCC on magnetic media contained in the Tariff Review Plan (TRP). As indicated in Chart 1 of this Attachment, one copy of the "floppy disks" should be filed with ITS at the time of filing the Access Tariffs. The second copy should be filed with Mark Uretsky, Tariff Review Branch in Room 514. The third copy should be filed with Accounting and Audits Division, 2000 L St. N.W., Room 812.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due November 16, 1990 regardless of whether the tariff revisions are submitted on or before November 1, 1990. Replies may be filed only by the publishing carriers and will be due on November 29, 1990. Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and not a docket number. Petitions should be organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served simultaneously upon the publishing carrier or petitioner. Additionally, ITS must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the January 1, 1991 Access Tariff Revisions or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the January 1, 1991 Access Tariff Revisions may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, ITS. Parties should contact Wilbur Thomas of ITS at (202) 857-3800.

ATTACHMENT C, CHART 1

JANUARY 1, 1991 ACCESS TARIFF REVISIONS

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	Tariff Review Plan DISKETTE	61.38 OR PRICE CAP COST SUPPORT VOL.1 D&J ONLY	61.38 OR PRICE CAP COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF 61.38 MATERIAL
MELLON BANK PITTSBURGH	1	-	-	-	-	-
SECRETARY'S OFFICE-ROOM 222 1919 M ST., N.W.	1	2	-	-	-	-
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PEYTON WYNNS ROOM 538	-	-	1	-	-	-
ACCTG & AUDITS DIVISION 2000 L ST. ROOM 812	1	1	1	1	-	-

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